

FEDERAL PUBLIC DEFENDER NEWSLETTER

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No. 14

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2000

February

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FEDERAL CRIMINAL LAW SEMINAR

March 7, 2000 - 9:00 A.M. - 4:00 P.M. at Sinclair Community College in Dayton, Ohio. There is no cost for this seminar if you are a member in good standing with any Federal Bar Association. If you are interested in receiving more information, please contact Beth Goldstein Lewis at (937) 225-7687.

FPD WELCOMES THE 21ST CENTURY

By the end of last year, we were all annoyed by the doomsday forecasts brought on by the Y2K problem.® The Office of the Federal Public Defender at the Southern District of Ohio hereby welcomes the arrival of the new millennium with the creation of a website that is located at <http://www.gcfeb.com/fpdo>. The website has been created with the assistance of our computer guru, Jack McMullin, who is currently working diligently to eradicate all of its bugs. It is projected that the website will be fully operational by March 1, 2000.

Once the website is accessed, the user will be

presented with a menu of options for their further enjoyment. One of the benefits of the website is access to this newsletter.

All newsletters that are published on or after the May 2000 edition will be found at the website. Remember, the publication schedule for the newsletter is quarterly. Therefore, new editions of the newsletter will be found on the website every February, May, August, and November.

If you do not have access to the internet, please call Barbara Wilson at (614) 469-2999 and she will make special arrangements to have a newsletter mailed by U.S. mail. If you would like the newsletter sent directly to your e-mail address, please call Barbara and she will get your address and make the necessary arrangements to accommodate your needs.

For those of you that will access the newsletter on the world wide web, once the newsletter is found online, you have the choice to review it online or download it to your machine for further review. For those of you that choose to download the newsletter, you will need the Adobe Acrobat software to accomplish this task.

However, do not fret if you do not have Adobe, as it is available free on the world wide web and our website will have a link to that site.

It is our sincere hope that this publication will become a more powerful tool to the criminal defense practitioner by making this publication available online. By being online, the newsletter becomes searchable for terms and case names.

Moreover, if you have an open research database that is minimized when the newsletter is also open, there will be live hyperlinks that will jump you directly from the newsletter to the case found in the database.

The office plans to place all of the newsletters from February 1999 to the present on line which will make all of the reported Supreme Court and Sixth Circuit cases decided in that time available. This will make us all heroes to our loyal support staffs as they will be able to effectively use the cut and paste features of most word processing systems to incorporate relevant text into documents. If you have any technical problems with using the website or accessing the newsletter, please call Jack McMullin at (614) 469-2999. If you have any editorial comments to the newsletter, please send them to S.Nolder@gcfcb.com.

RECENT SUPREME COURT CASES

New York v. Hill, C.U.S.C., 120 S.Ct. 659 (2000).

The Interstate Agreement on Detainers (IAD) is a compact to establish procedures for the resolution of one state's outstanding charges against a prisoner of another state. The state seeking to bring charges against a prisoner in another state's custody begins the process by filing a detainer. This detainer acts as a request by the State's criminal justice agency that the institution in which the prisoner is housed hold the prisoner for the agency or notify the agency when release is imminent. After a detainer has been lodged against him, a prisoner may file a request for a final disposition to be made of the charges. After this request is made, the prisoner shall be brought to trial within 180 days provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary reasonable continuance.

Resolution of the charges can also be triggered by the charging jurisdiction which may request temporary custody of the prisoner for that purpose. In that case, the trial shall commence within 120 days of the prisoner's arrival in the receiving state subject to continuances, for good cause shown. If the defendant is not brought to trial within the applicable time, the IAD requires dismissal of the indictment, with prejudice.

In this case, New York lodged a detainer against Hill, who was an Ohio prisoner. Hill signed a request for disposition of the detainer pursuant to the IAD. Once Hill was in New York, the prosecutor moved to continue the trial date past the IAD limit and Hill's counsel assented to this request.

However, prior to the commencement of the trial, Hill moved to dismiss the indictment and argued that the IAD's time limit had expired. The trial court found that the IAD time limit expired but that Hill's counsel's agreement to a trial beyond the 180 day limit constituted a waiver of Hill's rights under the IAD. The New York Supreme Court affirmed and the New York Court of Appeals reversed after finding defense counsel's agreement to a later trial date did not waive Hill's speedy

trial rights under the IAD.

The Supreme Court reversed and held that for certain fundamental rights, the defendant must personally make an informed waiver. For other rights, a waiver may be effected by action of counsel. The Court held that the lawyer has full authority to manage the conduct of the trial. Scheduling matters is plainly among those for which agreement by counsel generally controls. Requiring express assent from the defendant himself for such routine often repetitive scheduling determinations would consume time to no apparent purpose.

Martinez v. Court of Appeals of California, C.U.S.C., 120 S.Ct. 684 (2000).

Martinez is a self-taught paralegal and while he was employed at a law firm in California, he was accused of converting client money to his own use. Martinez represented himself at trial because there wasn't an attorney on earth who'd believe me once he saw my past criminal record. The jury acquitted Martinez of one count but convicted him of another and he was sentenced to prison.

Martinez filed a timely notice of appeal and a waiver of counsel. The California Court of Appeals denied Martinez's request for self-representation and the California Supreme Court affirmed.

In *Faretta v. California*, 422 U.S. 806 (1975), the Court found that a defendant has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. However, the Court found that this reasoning does not apply when the defendant becomes an appellant and assumes the burden of persuading a reviewing court that his conviction should be reversed. The Court found that unlike the inquiry in *Faretta*, the historical evidence does not provide any support for an affirmative constitutional right to appellate self-representation.

The 6th Amendment identifies basic rights that are available in preparation for a trial and the trial itself. However, the Court concluded that the 6th Amendment does not apply to appellate proceedings because the right to appeal is primarily a creature of statute. The Court found that the courts may still exercise their discretion and allow a lay person to proceed *pro se*. Furthermore, the Court found that states may use their own constitutions to find a state constitutional right to self-representation on appeal. However, the Court held that there was no federal constitutional right to self-representation on appeal.

Illinois v. Wardlow, C.U.S.C., 120 S.Ct. 673 (2000).

A four car caravan of uniformed police officers were patrolling a neighborhood in Chicago known for heavy narcotics trafficking. Wardlow was observed standing next to a house holding an opaque bag and when he looked in the direction of the officers, he fled. Two

officers chased Wardlow and when he was stopped, a pat

The trial court denied Wardlow's motion to suppress after finding that the firearm was recovered during a lawful stop and frisk. The Illinois Appellate Court reversed after concluding that the officers did not have reasonable suspicion sufficient to justify an investigative stop under *Terry v. Ohio*, 392 U.S. 1 (1968). The Illinois Supreme Court affirmed and found that sudden flight in a high crime area does not create a reasonable suspicion to justify a *Terry* stop.

The United States Supreme Court found that *Terry* provides that an officer may, consistent with the 4th Amendment, conduct a brief investigative stop when the officer has reasonable, articulable suspicion that criminal activity is afoot. Although reasonable suspicion only requires a showing considerably less than a preponderance of the evidence, the officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity.

The Supreme Court held that the presence of an individual in a high crime area alone does not support a particularized suspicion that the person is committing a crime. However, when a person's presence in a high crime area is coupled with his unprovoked flight, a particularized suspicion that the person was involved in criminal activity is created. A Headlong flight -- wherever it occurs -- is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. Thus, the Court found that the officers were justified in suspecting that Wardlow was involved in criminal activity and the Illinois Supreme Court was reversed.

Reno v. Condon, 5 U.S. C, 120 S.Ct. 666 (2000).

State department of motor vehicles (DMV) require individuals to provide their name, address, telephone number, vehicle description, social security number, medical information and photographs as a condition of obtaining a driver's license or registering a motor vehicle. The Driver's Privacy Protection Act of 1994 (DPPA) (18 U.S.C. ' 2721-2725) regulates the disclosure and resale of this personal information by the DMV to third parties.

Title 18 U.S.C. ' 2721(a) prohibits any state DMV from knowingly disclosing . . . to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record. However, this ban on disclosure of personal information does not apply to drivers who consent to the release of their data.

South Carolina law conflicted with the DPPA because under South Carolina law, the information

Weeks' conviction was affirmed on direct appeal. The district court dismissed Weeks' ' 2254 petition and denied a certificate of appealability. The

down search for weapons yielded a firearm.

contained in the State's DMV records was available to any person who made both a written request and the appropriate disclosures. This conflict prompted South Carolina to file suit alleging that the DPPA violated the 10th and 11th Amendments to the United States Constitution.

The district court found that the DPPA was incompatible with the principles of federalism inherent in the Constitution's division of power between the States and the Federal Government. Therefore, the district court granted summary judgment in favor of South Carolina and permanently enjoined the DPPA's enforcement against the State. The 4th Circuit Court of Appeals affirmed.

The Supreme Court reversed and found that the DPPA was a proper exercise of Congress' authority to regulate interstate commerce under the Commerce Clause. The personal identifying information that the DPPA regulates is a thing in interstate commerce and the sale or release of that information in interstate commerce is a proper subject of congressional regulation.

Weeks v. Angelone, 5 U.S. C, 120 S. Ct. 727 (2000).

Weeks admitted killing a Virginia Highway Patrol trooper and he was convicted of this offense. At the penalty phase of his trial, the state sought to prove 2 aggravating circumstances to justify the death penalty.

On the second day of deliberations, the jury asked the following question: Does the sentence of life-imprisonment in the State of Virginia have the possibility of parole, and if so, under what conditions must be met to receive parole? The judge proposed the following response: You should impose such punishment as you feel is just as evidenced within the instructions of the Court. You are not to concern yourselves with what may happen afterwards. The State agreed with the response but Weeks objected. Nonetheless, the judge instructed the jury as proposed. Approximately three and a half hours later, the jury asked the following question: If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify?

The trial court gave the following response: See second paragraph of Instruction #2. The prosecution felt that this response was appropriate whereas the defendant objected. Two hours later, the jury returned a verdict sentencing Weeks to death.

Fourth Circuit Court of Appeals also denied a certificate of appealability. The Supreme Court granted *certiorari* and determined that the question presented was whether

the Constitution is violated when a trial judge directs a capital jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to a question regarding the proper consideration of mitigating circumstances?@

The Supreme Court affirmed and found that the instruction given was sufficient to allow the jury to consider mitigating evidence. A jury is presumed to both follow its instructions and understand the judge's answer to its question. There was no indication in the record that Weeks=jury did not understand its role in the process.

The Court concluded that ' 2254 prohibits federal habeas relief on any claim adjudicated on the merits in state court proceedings,@ unless that adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.@ The Court found that Weeks=conviction and sentence was neither contrary to nor did it involve an unreasonable application of Supreme Court precedent.

Smith v. Robbins, 528 U.S. 32, 120 S. Ct. 746 (2000).

In *Anders v. California*, 386 U.S. 738 (1967), the Court set forth a procedure for an appellate counsel to follow in seeking permission to withdraw from representation when he concludes that an appeal would be frivolous. This procedure includes a requirement that counsel file a brief referring to anything in the record that might arguably support the appeal.@

After *Anders* was decided, California adopted a new procedure to deal with frivolous appeals. Under the new regime, once counsel concludes that an appeal would be frivolous, he must file a brief with the appellate court that summarizes the procedural and factual history of the case. Counsel must also attest that he has: reviewed the record, explained his evaluation of the case to his client, provided the client with a copy of the brief, and informed the client of his right to file a *pro se* supplemental brief.

Counsel must then request the reviewing court to independently examine the record for arguable issues.

Unlike the *Anders* procedure, counsel following this procedure neither explicitly states that his review has lead him to conclude that an appeal would be frivolous nor requests leave to withdraw. Instead, counsel remains silent on the merits of the case and expresses his availability to brief any issues on which the court might desire briefing. Consequently, this new regime does not require counsel to raise issues. Once this brief is filed, the appellate court must conduct a review of the entire record, regardless of whether the defendant files a *pro se* brief.

Martinez-Salazar and a co-defendant were tried by a jury for weapon and narcotics offenses. Pursuant to

Robbins represented himself at trial and was convicted of second degree murder and grand theft. On appeal, Robbins was represented by appointed counsel who concluded that an appeal would be frivolous. Counsel filed a brief that complied with the new regime. Robbins then filed a *pro se* brief alleging a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The court of appeals agreed with counsel's assessment of Robbins= appeal and found that no arguable issues exist.@ The California Supreme Court denied Robbins=petition for review.

Robbins filed a ' 2254 petition and one of the claims was that his appointed appellate counsel filed a brief that failed to comply with *Anders*. The district court found that there were at least 2 issues that counsel should have raised in the brief pursuant to *Anders*. The district court concluded that appellate counsel's performance was ineffective because he failed to raise these 2 issues. Moreover, the district court applied a presumption of prejudice and ordered California to grant Robbins a new appeal. The 9th Circuit Court of Appeals affirmed and found that the methodology controlling frivolous appeals set forth in *Anders* was obligatory on the states.

The Supreme Court reversed and found that the *Anders* procedure is not an independent constitutional command, but rather is just a prophylactic framework@ that the Court established to vindicate the constitutional right to appellate counsel. The Court concluded that the *Anders* procedure is merely one method of satisfying the constitutional requirements for indigent criminal appeals.

However, the Court found that the States may craft procedures that, in terms of policy, are superior to, or at least as good as, that set forth in *Anders*.

The Court then evaluated the California procedure used in this case. The Equal Protection and Due Process Clauses require that a state's procedure afford adequate and effective appellate review to indigent defendants.@ A state's procedure provides adequate review as long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merits of that appeal.@ An indigent defendant who has his appeal dismissed because it is frivolous has not been deprived of a fair opportunity to litigate his appeal if this procedure is followed.

The Court concluded that the California system affords adequate and effective appellate review that the Due Process and Equal Protection Clauses require. Therefore, the 9th Circuit's decision was reversed and the case was remanded for further findings.

United States v. Martinez-Salazar, 528 U.S. 307, 120 S. Ct. 774 (2000).

Fed. R. Crim. P. 24(b), the district court allotted the co-defendants 10 peremptory challenges to exercise jointly.

In *voir dire*, a potential juror stated that he would attend to favor the prosecution.⁶ Moreover, the juror disagreed with the proposition that the government has the burden of proving a defendant guilty beyond a reasonable doubt.

Martinez-Salazar challenged the juror for cause and the government opposed the challenge. The district court denied the challenge for cause and Martinez-Salazar then removed the juror with a peremptory challenge.

Martinez-Salazar exhausted his peremptory challenges but did not either ask for additional challenges or challenge the 12 jurors who were seated.

On appeal, Martinez-Salazar contended that the district court abused its discretion by refusing to strike the juror for cause and that this error forced him to use a peremptory challenge. The 9th Circuit found that the district court's refusal to strike the juror was an abuse of discretion. However, the 9th Circuit found that this error did not violate the Sixth Amendment because the juror was removed and the impartiality of the jury that was seated was not challenged. Nonetheless, the 9th Circuit reversed Martinez-Salazar's conviction after finding that the error forced him to use the peremptory challenge curatively and impaired his right to the full complement of peremptory challenges that were provided under federal law.

The Supreme Court found that a peremptory challenge reinforces the defendant's right to trial by an impartial jury. However, a peremptory challenge is not a right of federal constitutional dimension. Instead, there is only one substantive control over a federal criminal defendant's choice of whom to challenge. Under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race.

When the district court refused to excuse the juror for cause, Martinez-Salazar had the option to allow the person to remain on the jury and pursue a Sixth Amendment challenge on appeal if he was convicted. Instead, Martinez-Salazar elected to use the challenge to remove the juror. The Court concluded that this was Martinez-Salazar's choice. The district court did not demand and Rule 24(b) did not require Martinez-Salazar to use a peremptory challenge curatively.

To use the peremptory challenge to remove the juror rather than take his chances on appeal, Martinez-Salazar did not lose a peremptory challenge. Instead, Martinez-Salazar used his challenge in line with a principle reason for peremptory challenges: to help secure the constitutional guarantee of trial by an impartial jury. Thus, the Court held that a defendant's exercise of peremptory challenges under Fed. R. Crim. P. 24(b) was not impaired when the defendant used a peremptory

The 6th Circuit found that the district court violated the double counting rule by applying a specific offense characteristic for Smith's possession and/or use

challenge to remove a juror who should have been excused for cause.

RECENT SIXTH CIRCUIT CASES

Zhislin v. Reno, 195 F.3d 810 (6th Cir. 1999).

Zhislin had been under detention by the INS for more than 3 years because of the inability of INS to identify a county to which he could be deported. Zhislin did not contest his deportability, but he filed suit pursuant to 28 U.S.C. ' 2241 asserting a right to release from detention. Zhislin alleged that because there was little likelihood that the INS would ever be able to deport him, his detention was in violation of the 5th Amendment guarantee of due process and the 8th Amendment prohibition against excessive bail.

The district court dismissed Zhislin's suit after finding that 8 U.S.C. ' 1252(g) did not give it jurisdiction over his claim. The 6th Circuit reversed and found that even after the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, the district court had jurisdiction to consider Zhislin's claim. The court found that jurisdiction existed because Zhislin did not challenge the Justice Department's discretion to prosecute. Thus, Zhislin did not present a challenge arising from the decision or action by the Attorney General to execute removal orders.⁷

United States v. Smith, 196 F.3d 676 (6th Cir. 1999).

This case arose out of Smith's intentional shooting of a police officer who was searching Smith's hotel room. Smith pled guilty to: assaulting a federal officer; carrying a firearm during a crime of violence; being a felon in possession of a firearm; being a fugitive in possession of a firearm; receiving a firearm while under indictment; and possessing a firearm with an obliterated serial number. All counts, except the ' 924(c) offense, were grouped as closely-related counts and Smith's total offense level was determined to be 26. However, the district court departed upward to a level 31 because of Smith's: (1) discharge of a firearm; (2) criminal purpose; and (3) infliction of serious bodily injury.

On appeal, Smith argued that the district court violated the double counting rule by applying the specific offense characteristics for possessing a firearm with an obliterated serial number and using a weapon in connection with another felony offense when a sentence for the ' 924(c) offense was also imposed. Smith contended that his sentence for the ' 924(c) conviction prevented the use of these specific offense characteristics.

of a firearm in connection with another felony under ' 2K2.1(b)(5) when a separate sentence for the ' 924(c) offense was also imposed. However, the court found that

the district court's enhancement for an obliterated serial number pursuant to ' 2K2.1(b)(4) and the imposition of a sentence for the ' 924(c) offense was not double counting. The fact that a gun has an obliterated serial number is a distinct issue from a defendant's use and/or possession of a gun.

The court also found that the 3 level enhancement for assaulting a federal officer pursuant to ' 3A1.2 was not double counting even though Smith was convicted of assaulting a federal officer in violation of 18 U.S.C. ' 111. The court found that ' 3A1.2 requires an additional element not required by ' 111, *i.e.*, that the defendant knew or had reason to know that the victim was a law enforcement officer. Furthermore, the aggravated assault guideline (' 2A2.2) does not take into account the federal status of the victim.

Smith also contended that the district court's 3 bases to justify the upward departure violated the double counting rule because they were already considered under ' 2K2.1(c) through a cross-reference to ' 2A2.2. The court found that a departure pursuant to ' 5K2.9 for the commission of a felony to conceal a second felony did not violate the double counting rule because ' 2A2.2 does not take into account the commission of an assault to conceal another offense. Finally, the court found that the upward departure was appropriate as this case was sufficiently atypical to take it outside of the heartland of cases that normally would be governed by ' 2K2.1.

United States v. Smith, 197 F.3d 225 (6th Cir. 1999).

The 5 defendants were all involved in a scheme to defraud insurance companies by staging accidents and collecting insurance proceeds for their feigned injuries.

The last staged accident occurred on January 17, 1992 but the defendants continued to communicate with insurance companies and demand money until May 8, 1992. On February 4, 1997, the federal grand jury indicted the defendants for conspiracy to defraud the insurance companies and alleged a time frame of events between 1989 and May 8, 1992. However, no overt acts were alleged to have occurred after January 17, 1992.

The defendants argued that the indictment was returned after the 5 year statute of limitations expired. Consequently, on August 5, 1997, a superseding indictment was returned and the conspiracy count was redrafted to include overt acts that occurred within 5 years of the return of the original indictment.

The district court found that the superseding indictment related back to the time of the filing of the original indictment and cured any possible statute of limitations defect. All defendants went to trial and were convicted.

The 6th Circuit then found that Fed. R. Evid. 803(5) allows a document to be read to the jury as a past

On appeal, the defendants raised the statute of limitations issue. The 6th Circuit found that once an indictment is returned, the statute of limitations is tolled.

The defendants maintained that the statute of limitations expired on January 17, 1997 which was the last overt act that was plead in the conspiracy count contained in the original indictment. Normally, the date of the last overt act alleged to have occurred in furtherance of the conspiracy begins the clock for purposes of determining a possible violation of the statute of limitations.

The 6th Circuit found that the government's failure to include the May 8, 1992 date as an overt act was an error in form and not substance. Furthermore, the court found that because the original indictment was returned on February 4, 1997, it was filed within 5 years of the completion of the defendant's criminal activity because the last act that they committed occurred on May 8, 1992 when they last demanded money from the insurance company.

As long as the superseding indictment does not broaden the scope of the original indictment, the superseding indictment relates back to the filing of the original indictment even if the superseding indictment is filed outside of the statute of limitations. The court found that the superseding indictment did not broaden the first indictment and that it related back to the filing of the original indictment.

During trial, Defendant Robert Smith moved for severance after his co-defendants' counsel elicited an incriminating statement from a government witness. This question was triggered by an out-of-court statement that the witness gave to law enforcement officials 15 months after the events described therein. Although the witness had no present recollection of the facts contained in the statement, the witness stated that she did not lie when the statement was made.

The district court admitted the witness' testimony as a past recollection recorded under Fed. R. Evid. 803(5). On appeal, Smith claimed that the district court erred by both denying his motion for severance as well as admitting the testimony as a past recollection recorded.

On the severance issue, the 6th Circuit found that the defendant shoulders a heavy burden of showing specific and compelling prejudice resulting from a joint trial that can be rectified only by separate trials. The fact that a defendant attempted to lay the blame on other defendants is not reason enough for a severance without a showing that the jury was unable to treat the evidence applicable to each defendant distinctively. The court found that the admission of the evidence did not substantially prejudice Smith and the district court did not err in denying his motion for severance.

recollection recorded if: (1) the witness once had knowledge of the facts in the document; (2) the witness

now has insufficient memory to testify about the matters in the document; and (3) the document was recorded at a time when the matters were fresh in the witness' mind and the document correctly reflects the witness' knowledge of the matters.

Smith challenged the freshness of the statement because it was given to law enforcement officials 15 months after the event described therein. However, the 6th Circuit concluded that contemporaneousness is not required in determining whether an event was sufficiently fresh to satisfy Fed. R. Evid. 803(5). Under the facts of this case, the court found that the 15 month delay between when the statement was given and the event described therein met the freshness requirement of Fed. R. Evid. 803(5).

United States v. Baker, 197 F.3d 211 (6th Cir. 1999).

Baker's various girlfriends had obtained protective orders restraining him from committing acts of domestic violence. These orders notified Baker that it was a federal crime to purchase or possess a firearm while subject to the order. Nonetheless, Baker purchased an assault rifle and he accidentally shot himself and this alerted the authorities that Baker was in possession of a firearm. Thus, Baker was charged with violating 18 U.S.C. ' 922(g)(8) which makes it unlawful for a person subject to a domestic violence protection order to possess a firearm.

In the district court, Baker argued that ' 922(g)(8) was unconstitutional and the district court denied the motion. Baker then requested the district court to instruct the jury that in order to establish a violation of ' 922(g)(8), the government must prove that the defendant knew that his conduct was illegal. The district court refused this request and the jury convicted Baker of violating ' 922(g)(8).

The district court enhanced Baker's offense level pursuant to USSG ' 2K2.1(a)(4)(B) as the weapon was a prohibited weapon under 18 U.S.C. ' 921(a)(30).

Baker argued that the enhancement, based solely on his possession of an assault rifle, violated his equal protection rights because of selective prosecution. The court found that there were 3 elements of an equal protection claim based on selective prosecution. First, the state actor must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. Second, he must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must

The 6th Circuit found that because Haio filed an application for a writ of habeas corpus under ' 2241, the district court had jurisdiction to consider his claim. Furthermore, the court found that Congress did not intend

have a discriminatory effect on the group which the defendant belongs to.®

The court found that Baker failed to produce any evidence that the prosecutor singled him out for prosecution. The court found that because ' 922(g)(8) does not effect either a fundamental right or a suspect class, only a rational basis standard of review needs to be applied. The court found that the statute was rationally related to a legitimate government interest in curtailing domestic violence.

Baker then alleged that in enacting ' 922(g)(8), Congress reached beyond its authority to regulate commerce. However, the 6th Circuit found that ' 922(g)(8) did not suffer the same fate as the statute considered in *United States v. Lopez*, 514 U.S. 549 (1995). The court found that ' 922(g)(8) relates to commerce and ensures only those activities affecting interstate commerce fall within its scope.

Finally, Baker argued that the district court erred in failing to instruct the jury that it could not convict him of violating ' 922(g)(8) unless he knew the law forbade him to possess firearms while subject to a domestic violence protection order. The court found that ignorance of the law is not a defense recognized by ' 922(g)(8). Moreover, in this case, each of the protective orders that Baker received had a specific warning that he could not lawfully possess firearms after the orders were issued. Thus, Baker could not expect to possess weapons free from extensive government regulation.

Haio v. INS, 199 F.3d 302 (6th Cir. 1999).

Haio is a native of Iraq who immigrated to the United States in 1977 and was convicted of a drug crime in 1992 that prompted the INS to initiate deportation procedures. In 1995, Haio conceded deportability but requested permission for relief from deportation under 8 U.S.C. ' 1182(c) because he served less than 5 years of confinement on the drug case. The immigration judge found that Haio served 5 years and 2 days of confinement and consequently held that Haio was ineligible for relief and ordered his deportation.

Haio appealed this decision and argued that the computation of his prison sentence was erroneous but the Board of Immigration Appeals dismissed the appeal. One day before Haio was to surrender to the INS, he filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. ' 2241 seeking judicial review of his deportation order. The district court issued an order of remand in which the Board of Immigration Appeals was ordered to investigate whether Haio served more than 5 years in prison and the government appealed.

for the AEDPA to apply retroactively to pending immigration cases. Accordingly, the 6th Circuit affirmed the district court's order of remand in which the Board of Immigration Appeals was ordered to investigate whether

Haio served more than 5 years in prison for his drug conviction.

Myers v. United States, 198 F.3d 615 (6th Cir. 1999).

In 1995, Myers was indicted for being a felon in possession of a firearm in violation of 18 U.S.C. ' 922(g). Myers attempted to stipulate his status as a convicted felon to prevent the government from revealing the nature of his convictions to the jury but the district court denied Myers' request. Consequently, Myers stipulated that the felonies alleged in the indictment accurately reflected his prior record. However, the government was still permitted to inform the jury of the nature of the convictions.

Myers was convicted and while his appeal was pending, the Supreme Court decided *Old Chief v. United States*, 117 S. Ct. 644 (1997). *Old Chief* held that defendants are entitled to have the nature of their prior felony convictions excluded from the jury in felon in possession of a firearm cases. Myers' conviction was affirmed on direct appeal and he then filed a ' 2255 action alleging that he was entitled to a new trial in light of the *Old Chief* decision.

The district court denied the ' 2255 motion and, on appeal, Myers argued that the district court misapplied *Old Chief*. The 6th Circuit found that *Old Chief* announced a new rule of criminal procedure that may not be invoked on collateral review by defendants whose convictions were final before the rule was announced. A conviction is final when the judgment of conviction was rendered, the availability of appeal exhausted, and the time for filing a petition for a writ of certiorari has elapsed.

The court found that because Myers' direct appeal was pending when *Old Chief* was decided, he was not barred from relying on that case in his ' 2255 petition. Moreover, applying *Old Chief* to this case, the 6th Circuit found that the district court erred by allowing the government to decline Myers' initial offer to stipulate. However, the court found that the district court's error was harmless as it did not materially affect the verdict.

Binder v. Stegall, 198 F.3d 177 (6th Cir. 1999).

Binder was convicted in a Michigan State court of distributing more than 650 grams of cocaine and sentenced to life imprisonment. In his ' 2254 petition, Binder argued that the following reasonable doubt instruction violated the due process clause: AA reasonable doubt is a fair, honest doubt growing out of evidence or lack of evidence. It is not merely an imaginary doubt or

In this case, Wilson's convictions were too old to affect his guideline range and thus he claimed they were not material. However, the 6th Circuit found that Athe fact that the offenses Wilson committed under his birth name were too old to qualify in establishing his

possible doubt, but a doubt based upon reason and common sense. A reasonable doubt is just that C a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case.@

The district court denied Binder's claim. On appeal, Binder argued that the definition was circular and that the omission of language concerning the certainty required in order to convict lessened the government's burden of proof. The 6th Circuit held that the ADue Process Clause required that the reasonable doubt instruction not lead the jury to convict on a lesser showing than reasonable doubt= and, when taken as a whole, adequately conveys the concept of reasonable doubt. The circularity and possible ambiguity does not render the instruction constitutionally infirm.@

United States v. Wilson, 197 F.3d 782 (6th Cir. 1999).

Wilson was sentenced to serve a prison term at a federal prison in Ashland, Kentucky and was afforded the luxury of self-surrender to serve the sentence, but he failed to report. Consequently, Wilson was indicted for failing to report in violation of 18 U.S.C. ' 3146(a)(2) and he pled guilty. In the plea agreement, the government agreed to recommend a 2 level reduction for acceptance of responsibility. However, after learning that Wilson lied to the probation office and magistrate about his legal name and criminal history, the government objected to the acceptance of responsibility reduction. Moreover, the government argued that Wilson's offense level should be increased for obstruction of justice pursuant to USSG ' 3C1.1.

The district court did not afford Wilson an acceptance of responsibility reduction and did enhance his guidelines for obstruction of justice for misleading the court system about his criminal history. On appeal, Wilson argued that his use of an assumed name was not material to his conviction or sentence and thus the district court erred by imposing the obstruction of justice enhancement.

The court found that the commentary to ' 3C1.1 suggests that the enhancement should be applied when a person Aprovided materially false information to a judge or magistrate or provides materially false information to a probation officer in respect to a presentence or other investigation for the court.@ Material information is information that if believed would tend to influence or affect the issue under determination.

criminal history category is not determinative because the information could well have influenced or affected the district court's determination of Wilson's sentence within the appropriate guideline range.@ Thus, the court found that the district court did not err in applying ' 3C1.1.

Furthermore, the court found that it would only be a rare case in which a defendant would be granted an acceptance of responsibility reduction in his offense level when the court has also deemed it appropriate to increase his offense level for obstruction of justice. Thus, the 6th Circuit found that because of Wilson's deceit, he was not entitled to an acceptance of responsibility reduction and had earned an obstruction of justice enhancement.

Johnson v. Karnes, 198 F.3d 589 (6th Cir. 1999).

Johnson was indicted in the Franklin County Court of Common Pleas for a number of violent crimes. At Johnson's first jury trial, the jury acquitted him of some of the counts but hung as to 3 others. Therefore, a mistrial was declared on the 3 counts on which the jury hung.

At the second trial, the alleged victim testified about being robbed by Johnson. However, on cross-examination, defense counsel questioned the victim about the robbery allegation. Counsel asked the following question: "Sir isn't it true that a jury found my client not guilty of robbing you?" The prosecutor objected and after being cajoled by the court, moved for a mistrial as "a manifest necessity compelled a mistrial." The trial court granted the prosecutor's motion and scheduled the case for a retrial. Johnson then filed a motion to dismiss the 3 counts on double jeopardy grounds but the court denied this motion.

As a denial of a motion to dismiss on double jeopardy grounds is not a final appealable order under Ohio law, Johnson filed a ' 2254 petition which was denied by the district court. The 6th Circuit found that once jeopardy attaches, prosecution of a defendant before a jury, other than the original jury, is barred unless there is a manifest necessity for a mistrial or the defendant either requests or consents to a mistrial. Because Johnson neither requested nor consented to the mistrial, the court found that a mistrial was properly granted only if manifest necessity was present. Manifest necessity is not a concept that can be applied mechanically or without attention to the particular problem confronting the trial judge. The court found that "in passing on the propriety of a declaration of mistrial granted at the behest of the prosecutor or the court's own motion, the reviewing court must balance the valued right of the defendant to have his trial completed by the particular tribunal summoned to sit in judgment of him . . . against the public interest in insuring that justice is meted out to offenders."

Applying the AEDPA to this case, the 6th Circuit reversed the district court's denial of Johnson's ' 2254 petition. In making this decision, the court found

Farrow was charged with knowingly and forcibly using a motor vehicle to assault an INS agent

that the state court's grant of a mistrial involved an unreasonable application of the Supreme Court's manifest necessity standards. The trial judge pressured the prosecutor to make a decision as to the mistrial motion.

Moreover, the trial court failed to consider alternatives to declaring a mistrial. Finally, the State failed to articulate why manifest necessity required a mistrial. Accordingly, the 6th Circuit found that the double jeopardy clause barred a retrial in this case.

United States v Odom, 199 F.3d 321 (6th Cir. 1999).

In 1993, Odom was arrested on the same date for 5 armed robberies that were committed on different dates, involved 4 different victims, and were charged in 5 different indictments. Odom was sentenced by the state court to serve 5 concurrent 8 year sentences and was paroled in 1996. Two years later, Odom pled guilty to armed bank robbery in federal court. When Odom's attorney received the presentence report, he contacted the attorney who represented Odom on the state case and inquired as to whether a consolidation entry had been filed on the state cases. When the attorney on the state case responded that the cases were not formally consolidated, state counsel was advised to file a motion to consolidate and the state court judge signed and filed a consolidation entry.

At sentencing, Odom's attorney on the federal case argued that the state judge clearly intended for the cases to be consolidated for sentencing. However, the district court disagreed and sentenced Odom as a career offender pursuant to USSG ' 4A1.2. On appeal, Odom argued that his armed robbery convictions were related because they were consolidated for sentencing and should have been considered as a single conviction pursuant to USSG ' 4A1.2(a)(2).

The 6th Circuit found that the 5 armed robbery convictions were unrelated as the crimes occurred over a period of months and involved different victims. Moreover, the cases were prosecuted under separate indictments with different case numbers. The court found that the district court was justified in discounting the significance of the consolidation order as the order: did not state that it had *anunc pro tunc* effect; was obtained in an *ex parte* proceeding; was drafted by defense counsel and presented to the judge for signature without any background information being provided; was secured to reduce Odom's federal sentence; and was secured after Odom served his sentence and had no rehabilitative component.

United States v. Farrow, 198 F.3d 179 (6th Cir. 1999).

when the agent was engaged in the performance of his official duties in violation of 18 U.S.C. ' 111. A jury

convicted Farrow and, at sentencing, the district court enhanced his offense level for using a dangerous weapon pursuant to USSG ' 2A2.2(b)(2)(B). The district court also enhanced Farrow's offense level pursuant to ' 3A1.2(b) based on the victim's official status.

On appeal, Farrow argued that there was insufficient evidence to sustain his conviction under 18 U.S.C. ' 111. The 6th Circuit found that ' 111 did not require the government to show that the assailant was aware of the victim's official status to establish a violation of the statute. Instead, the government needed to prove that the federal officer was engaged in official duties at the time of the assault and that the defendant acted knowingly and that he committed a forcible assault.

Farrow conceded that the jury was properly instructed and at the time of the incident, the agent was engaged in his official duties as a law enforcement officer. However, Farrow maintained that the evidence was insufficient to allow a rational jury to conclude that he intended to harm the agent. Instead, Farrow argued that the evidence proved that he panicked and acted out of fear when strangers approached his vehicle in the parking lot of his estranged wife's apartment complex. The 6th Circuit rejected this argument and found that there was sufficient evidence from which the jury could infer that Farrow intentionally placed his car into gear and drove it at the agent.

Farrow also argued that the trial court violated the rule against double counting by relying upon the use of his car as a use of a dangerous weapon to elevate his offense level under the aggravated assault guideline as well as the Aotherwise used@enhancement under ' 2A2.2(b)(2)(B). The 6th Circuit found that impermissible double counting occurs when precisely the same aspects of the defendant's conduct factors into his sentence in 2 separate ways. Moreover, the court found that not all instances of double counting were impermissible. If the guidelines mandate double counting or if the Sentencing Commission intended to allow multiple penalties to be imposed for the same conduct, then double counting was permissible.

The court found that ' 2A2.2 was not written in contemplation of the situation presented where a dangerous weapon is not dangerous at all unless it is Aotherwise used.@ In this case, the weapon in question, a car, was not inherently dangerous. Therefore, nothing about its mere possession would increase the peril associated with an assault. Farrow did not Aotherwise use his car in the assault of the agent as distinct from the conduct that brought his offense within the aggravated assault guideline in the first instance.@

Using the standard, the question presented was whether the Michigan Supreme Court's finding of harmless error was contrary to, or involved in unreasonable application of federal law? An

In this case, Farrow did not possess and use an inherently dangerous weapon. Therefore, the 6th Circuit found that Farrow's sentence was determined to be a product of impermissible double counting and vacated the 4 level enhancement.

Finally, Farrow argued that the district court erred by enhancing his offense level based on the official status of the victim. Even though ' 111 does not require the government to prove that defendant was aware of the victim's official status, actual or constructive knowledge is required to sustain the enhancement under ' 3A1.2 The court found that portions of the record support the enhancement while other portions point to a contrary result. However, because the clearly erroneous standard of review was the standard to be applied, the 6th Circuit affirmed the enhancement.

Barker v. Yukins, C F.3d C, 1999 WL 1146742 (6th Cir. 1999).

Barker admitted killing a resident at a senior citizen's complex where she was employed but claimed the killing was in self-defense. Barker was tried in a Michigan court in 1987 and the jury was unable to reach a verdict. At Barker's second trial, she was convicted of first degree murder and sentenced to serve life in prison.

One of the issues on direct appeal was whether the trial court erred in refusing to specifically instruct the jury that Barker was entitled to use deadly force to resist an imminent rape. The Michigan Court of Appeals found that the trial court's failure to deliver the instruction was not erroneous as the jury was generally instructed that Barker was entitled to use lethal force in self-defense if she believed that she was in danger of death or serious bodily injury. The court found that Barker was not entitled to have a self-defense instruction specifically tailored so that a jury was instructed that deadly force could be used to resist a rape.

The Michigan Supreme Court disagreed with the Court of Appeals decision but found that the trial court's error was harmless. Barker then filed a habeas petition which was denied by the district court and she appealed to the 6th Circuit.

Under the AEDPA, a petition for a *writ of habeas corpus* will issue where the state court proceedings: A(1) resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law; or (2) resulted in a decision which was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding.@

An unreasonable application@ exists if Areasonable jurists would find it so arbitrary, unsupported or offensive to existing precedent as to fall outside the realm of plausible credible outcomes.@

This standard requires Barker to demonstrate that the district court's failure to specifically instruct the jury that she was justified in using deadly force to resist a rape had a substantial and injurious effect or influence in determining the jury's verdict and resulted in actual prejudice. The 6th Circuit found that the trial court's error in failing to specifically instruct the jury that Barker would have been justified in using deadly force to stop an imminent rape had a substantial and injurious influence in determining the jury's verdict and resulted in actual prejudice to Barker.

The court also found that the Michigan Supreme Court's finding of harmless error substantially impaired Barker's due process right to present a full defense. The trial court's refusal to provide a specific jury instruction negated the very essence of Barker's claim of self-defense. Thus, petitioner simply cannot be considered to have had a meaningful opportunity to present a complete defense when the jury was so plainly misinstructed on a matter critical to her defense.

United States v. Samour, C F.3d C, 1999 WL 1206989 (6th Cir. 1999).

In 1992, Samour was sentenced to serve a 3 year term of supervised release after completing a prison sentence for his violations of 21 U.S.C. ' 841 and 846.

These convictions were classified as Class B felonies. Samour completed a 1 year term of supervision before the district court revoked the original term of supervised release and imposed an 18 month term of imprisonment as well as a new 3 year term of supervision.

On appeal, Samour argued that the district court was not authorized to revoke the original term of supervision and impose a term of imprisonment and a new term of supervision that aggregated to more than 36 months. The 6th Circuit found that under 18 U.S.C. ' 3583(h), a court may impose a new term of supervised release to follow the revocation of a term of supervision if the new term of imprisonment is less than the maximum term authorized under 18 U.S.C. ' 3583(e)(3).

Under this statute, a court can impose no more than a 3 year prison sentence for a supervised release violation for a Class B felony.

The court found that because Samour was convicted of a Class B felony drug charge in violation of 21 U.S.C. ' 841(b)(1)(C), the district court had the authority to impose a term of supervised release of **at least** three years. Moreover, the 18 month prison sentence that was imposed was less than the maximum term of imprisonment authorized under ' 3583(e)(3) (i.e.

The 6th Circuit found that the bank account was an essential part of Hartsel's scheme and the mailing was an essential part of the scheme. However, there was no evidence to show that the bank statements were used to further the scheme to defraud. The statements served

3 years).

Because the 18 month term of imprisonment was less than the maximum term authorized for a Class B felony, the district court did not err by sentencing Samour to a new 3 year term of supervised release. The length of the term of supervised release for drug offenses is governed by ' 841 and the **at least** language sets forth the minimum but no maximum term.

United States v. Hartsel, C F.3d C, 1999 WL 1188489 (6th Cir. 1999).

Hartsel was an attorney who represented a local Jeep dealership that also engaged him to establish a charity called **A**Stamp Out Hunger of Northwest Ohio (hereinafter referred to as SOH). Hartsel set up bank accounts in the name of SOH and all monthly bank statements and canceled checks were mailed to his office. The Jeep Charity Fund was a tax-exempt fund to which all union employees of the Jeep factory in the Toledo area contributed money to support local charities.

The Jeep Charity Fund sent SOH numerous donations and Hartsel diverted the money to pay his personal and professional expenses. For this stunt, Hartsel was indicted for mail fraud and embezzlement from a labor organization and was convicted in a bench trial.

To prove a claim under the mail fraud statute, the government must prove the following three elements: **A**(1) devising or intending to devise the scheme to defraud (or to perform specified fraudulent acts); (2) involving a use of the mails; and (3) for the purpose of executing the scheme or attempting to do so.

On appeal, Hartsel challenged the sufficiency of the evidence to support his mail fraud conviction. The court found that the mail fraud statute was not designed to reach all frauds, but only those limited instances in which the use of the mail was a part of the execution of the fraud. **A**The relevant question is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time. In order for the mailing to be in furtherance of the scheme, the scheme's completion or prevention of its detection must have depended, in some way, on the charged mailing.

The district court found that SOH's bank account was an essential part of the scheme to defraud and the mailing of the bank statements furthered the scheme. However, Hartsel argued that although these statements were received, opened, and filed, they were not used to further the scheme to defraud.

neither a bookkeeping nor an accounting function. Therefore, the 6th Circuit vacated the mail fraud conviction.

Hartsel also maintained that he could not be convicted of violating 29 U.S.C. ' 501(c)(3) which

The 6th Circuit found that the Jeep Charity Fund was a fund of a labor organization and, as such, was a trust fund belonging to the union members. In this case, the money in the Jeep Charity Fund was derived from the paychecks of all union employees and thus the fund was a trust fund managed by the union and used for charitable purposes. Therefore, the Jeep Charity Fund was a labor organization.

United States v. Shafer, C F.3d C, 1999 WL 1222641 (6th Cir. 1999).

Shafer was indicted for making false statements in violation of 18 U.S.C. ' 1001 and the jury convicted him of those charges. The district court calculated the total loss by adding the wages that the workers would have received had Shafer complied with the prevailing wage law to the amount of overtime that Shafer should have paid his workers for work they performed on unrelated non-government contracts. Title 29 U.S.C. ''

2001-2019 require employers to compensate an employee who works more than 40 hours a week at a rate not less than 1 1/2 times the regular rate at which he is employed. The district court found that the amount of overtime wages owed on non-government projects was relevant conduct that was to be included for Shafer's violation of ' 1001.

Based on this analysis, the court concluded that the false statements pertained to a matter within the jurisdiction of a federal agency. Even though the contract was with a state agency, a federal agency underwrote nearly 75% of the cost while Michigan contributed only 25%. Moreover, even though the contract was with a state agency, it was subject to federal regulation as evidenced by Shafer's required compliance with the federal prevailing wage laws.

Hill v. Brigano, CF.3dC, 1999 WL 1222642 (6th Cir. 1999).
appealed to the 6th Circuit.

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debatable among reasonable jurists,. . . if it is so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes.®

On appeal, Hill argued that the district court erred in finding that his 5th and 6th Amendment rights had been violated by the trial court's decision to permit the introduction of evidence obtained in violation of the standards set forth in *Edwards v. Arizona*, 451 U.S. 477 (1981). In *Edwards*, the Supreme Court held that once a suspect invokes his *Miranda* rights, all interrogation must cease unless the defendant initiates further conversation. If the police, rather than the suspect, initiate further communication, any waiver of the right to counsel is invalid. However, if the suspect initiates the conversation, a waiver of counsel will be recognized. However, if the suspect's inquiry was to the routine incidents of the custodial relationship, then a valid waiver of the right to counsel did not occur.

In this case, Hill voluntarily accompanied Belmont County officers to a Columbus police station for questioning at which time he asserted his right to counsel. The officers then questioned Palmer for 2 hours and he confessed to the crimes. Palmer and Hill were then placed in the same room and 45 minutes later, police renewed their interrogation of Hill who again asserted his right to counsel. Both men were arrested, charged with murder and placed in custody.

The next day, Hill appeared in the Franklin County Municipal Court for a removal hearing because he was arrested in Franklin County and the warrant for his arrest was issued out of Belmont County. Hill was ordered to be removed to Belmont County and during the removal process, he was transported by a Belmont County detective who again attempted to engage Hill in discussion about the facts of the case. However, Hill invoked his right to counsel. The following day, Hill and Palmer were taken to an initial appearance in Belmont County at which they were apprised of their *Miranda* rights and were appointed counsel. While being transported back to the jail, Palmer inquired as to whether the detectives had found the evidence about which he had told them during this confession. When the detective replied that the evidence had not been found, Hill stated that he knew where the evidence was located.

When Hill arrived at the Belmont County Jail, he told the Sheriff that he could lead the detectives to the location where the evidence could be found. The Sheriff

The 6th Circuit found that the testimony was inadmissible because, under Ohio law, co-conspirator statements must be made during the course of and in furtherance of the conspiracy or in an effort to conceal the conspiracy. The court found that Palmer's statement to

informed Hill that the detectives could not initiate a conversation because Hill was represented by counsel. However, Hill stated that he was willing to proceed without his attorney and this waiver was video-taped, with Hill's consent. Hill then lead the detectives to the location where additional incriminating evidence was located.

On appeal, Hill argued that his 5th and 6th Amendment rights were violated because the statement that he knew where the evidence was to be found® was not an initiation of contact. Furthermore, Hill argued that the detectives' numerous attempts to interview him after he invoked his right to counsel effectively coerced him into providing the location of the evidence.

The 6th Circuit found that Hill's statement about the evidence indicated that he was discussing the specifics of the criminal investigation. Thus, the court found that taking into account both the time lapse between the impermissible interrogation and the incriminating statements by the defendant and the fact that the defendant was aware that he had been assigned counsel, we believe the trial court was correct in analyzing the admissibility of this evidence under the initiation exception to *Edwards*.®

Hill also argued that he did not receive a fair trial because a trial judge prevented him from uncovering bias in potential jurors through the use of *voir dire*. The court found that a defendant's 6th Amendment right to a fair trial is violated only when the level of pretrial publicity was such that the trial was so compromised by the press that a fair trial was impossible. In this case, the pretrial publicity did not rise to a level that would make a fair trial impossible. Even though all potential jurors knew something about the crimes for which Hill was on trial, all empaneled jurors assured the trial judge that they would perform their duties impartially and base their verdict only on the evidence presented at the trial.

The third claim raised by Hill concerned the trial testimony of a detective during which he recounted Palmer's confession which implicated both defendants in the homicide. The trial court admitted the testimony as a co-conspirator exception to the hearsay rule and the district court affirmed. Hill argued that this testimony was inadmissible hearsay and that its admission violated his confrontation clause rights.

the police was neither made in furtherance of the conspiracy nor in an attempt to conceal a crime. However, the court found that this error was harmless as it did not have a substantial and injurious effect or influence in determining the jury's verdict.®

The final claim raised by Hill asserted that the district court erred in determining that the cumulative effect of prosecutorial misconduct did not violate his 6th Amendment right to a fair trial. In order for the prosecutor's misconduct to violate a defendant's right to a fair trial, an appellate court must determine that the prosecutor's actions also infected the trial with unfairness as to make the resulting conviction a denial of due process.⁶ Applying this standard to this case, the 6th Circuit found that the prosecutor's action did not constitute prosecutorial misconduct and affirmed the judgment of the district court denying Hill's request for a writ of habeas corpus.

Austin v. Mitchell, 5 C.F.3d C, 1999 WL 1256187 (6th Cir. 1999).

In 1986, Austin was charged with aggravated murder in Ohio, but the indictment failed to allege that the crime occurred against the peace and dignity of the State of Ohio.⁷ Austin moved for dismissal of the indictment because of this defect but his motion was overruled. Austin was convicted and although many issues were litigated on direct appeal, this alleged error was not.

The indictment defect was first raised by Austin in a state habeas action but flaws in an indictment are not cognizable in state habeas in Ohio. Austin then initiated a state post-conviction action in which he litigated this issue and his attorney's ineffectiveness to raise it on direct appeal. The state courts found that an indictment lacking the words "against the peace and dignity of the State of Ohio" was not fatally flawed. The Ohio Supreme Court declined to hear Austin's appeal on December 17, 1997 and he filed his ' 2254 petition on January 29, 1998.

Under the AEDPA, a state prisoner claiming imprisonment in violation of the laws or constitution of the United States has one year from the conclusion of his state appeal to file for federal habeas relief. For those whose state appeals were concluded prior to the passage of the AEDPA, the statute of limitations expired on 4/24/97, which was 1 year from the passage of the AEDPA. However, there is also a built-in tolling period for the statute of limitations for the time during which a properly filed application for state post-conviction or other collateral review with respect to a pertinent judgment or claim is pending . . .⁸

Austin claimed that the limitations period was tolled because his petition for post-conviction review was pending. Furthermore, Austin claimed that his habeas petition was properly filed as it was filed only 1 month

inside, the officers discovered a marijuana cultivation operation with 1900 plants growing. Dice was arrested, mirandized, and he invoked his right to counsel. One of the officers remarked about the quality

after the Ohio Supreme Court declined review of his post-conviction petition.

The district court held that the statute of limitations period was not tolled and Austin's petition was not timely because the technical defect of the indictment claim was not a cognizable federal habeas claim. The 6th Circuit agreed and found that in order to toll the AEDPA statute of limitations, a state post-conviction petition must raise a federal constitutional issue. The court found that Austin's post-conviction complaint regarding the defective indictment failed to satisfy this requirement.

The district court did not address whether Austin's allegation of the ineffectiveness of appellate counsel served to toll the statute of limitations. The 6th Circuit found that Austin's allegation of ineffectiveness of appellate counsel in his state court post-conviction petition did raise a federal constitutional claim. However, Austin failed to raise the ineffectiveness claim in his federal habeas petition. Thus, the court concluded that a state petition for post-conviction or other collateral review that did not address one or more grounds of the federal habeas petition is not a review with respect to the pertinent judgment or claim within the meaning of 28 U.S.C. ' 2244(d)(2)⁹ and therefore does not toll the statute of limitations.

United States v. Dice, 5 C.F.3d C, 2000 WL 10607 (6th Cir. 2000).

Pike County law-enforcement was informed that Dice was conducting an indoor marijuana cultivation operation and that he was using an excessive amount of electricity. A review of utility records revealed that Dice's monthly bills were as much as 10 times the average home in the area. Moreover, surveillance revealed that windows were covered and that there were 9 air vents cut into Dice's roof. A thermal imaging tape of Dice's residence revealed a large amount of heat escaping through the roof which indicated to agents that grow lights were possibly present.

A state judge issued a search warrant for Dice's house which the district court later determined was facially valid. Law-enforcement officers appeared at Dice's house to execute this warrant armed with no information that Dice was armed or dangerous. Once at the door, the officers announced their presence, knocked on the door, and waited a few seconds. After hearing movement in the house, the officers knocked the front door down.

of the plants and Dice then proceeded to discuss the quality of the plants and his growing methods. Dice was warned that he was violating his request to remain silent and he was again mirandized.

The district court concluded that the knock and announce rule was violated and ordered suppression of the physical evidence. Furthermore, the court found that Dice's statements were taken in violation of the 5th Amendment because they were in response to an officer's comments that constituted the initiation of conversation after Dice invoked his right to counsel.

The government perfected an interlocutory appeal in which they conceded that the entry was unreasonable under the 4th Amendment. The 6th Circuit held that absent exigent circumstances, it was unreasonable for an officer to enter a dwelling without first knocking and announcing his presence and authority.

An integral part of the knock and announce rule is the requirement that officers wait a reasonable period of time after a knock before physically forcing their way into a residence.

Exigent circumstances relieve officers of knock and announce requirements in 3 situations: (1) the persons within a residence already know the officers' authority and purpose; (2) the officers had a justified belief that someone within is in imminent peril or bodily harm; or (3) the officers had a justified belief that those within are engaged in escape or the destruction of evidence. However, the government has the burden of proving the existence of the exigencies and it conceded that they were not present in this case.

Instead, the government attempted to legitimate the search under the independent source doctrine. The government argued that the independent source doctrine rescued the search and seizure because the police had a valid search warrant prior to entering the residence and the evidence would have been discovered had the officers fully complied with the knock and announce requirement.

The 6th Circuit rejected this proposition as this case involved only one entry that was clearly illegal and it resulted in the seizure of evidence. A knock and announce violation makes a search unreasonable due to the unlawful method in which the warrant was executed, even if the underlying search was legal.

United States v. Tuttle, C F3d. C, 2000 WL 6148 (6th Cir. 2000).

Three search warrants issued for locations under the control of Tuttle and Settle based on information provided by an unidentified confidential informant. The informant stated that Tuttle and Settle were selling vehicles assembled with stolen parts and that

The theatrics and conduct of this Aspecial prosecutor was the object of Boyle's habeas petition. The prosecutor prefaced many of his cross-examination questions of Boyle by insinuating that Boyle had lied and that he was prepared to prove it. Moreover, the prosecutor indicated, on at least one occasion, that Boyle needed a psychiatrist.

this was an ongoing chop shop operation. While executing the warrant at the first location, evidence supporting this conclusion was found. Tuttle and Settle were indicted for operating a chop shop in violation of 18 U.S.C. ' 2322.

Both Tuttle and Settle filed motions to suppress physical evidence in the district court. The district court found that the first warrant lacked probable cause to conclude that there was any criminal activity occurring at the first location. Furthermore, the court found that the search warrant affidavit contained no information as to the informant's reliability or any attempts by law enforcement to independently corroborate the information provided by the informant. The gravamen of the district court's suppression order was that an uncorroborated tip by an anonymous informant was insufficient to establish probable cause.

The 6th Circuit reversed the district court's suppression order and found that information received from an informant, whose reliability is not established, may be sufficient to create probable cause when there is some independent corroboration of the information by the police. The court found that the police officers did corroborate the informant's statement that Tuttle and Settle were operating a chop shop when the officer examined a pick up truck that he concluded was rebuilt with stolen parts.

Boyle v. Million, C F3d C, 2000 WL 6123 (6th Cir. 2000).

Boyle was an ophthalmologist who practiced in Kentucky whose practice collapsed after he was sued numerous times for malpractice. On July 1, 1990, Boyle's chief office assistant, Miller, informed him that she was resigning to join one of Boyle's competitors. Upon learning of this, Boyle, who was intoxicated, telephoned Miller's husband and threatened to kill her. Later that night, Boyle was spotted in Miller's yard firing a shot gun toward her residence. When a neighbor intervened, Boyle shot this individual.

Boyle was arrested for assault, making terrorist threats and resisting arrest and he claimed that severe intoxication obliterated his memory of the incident. Because of Boyle's standing in the community, a special prosecutor represented the Commonwealth and a visiting judge presided over the trial which was moved to a neighboring county.

However, the prosecutor saved his curtain call performance for his summation when he alleged that Boyle was a privileged individual and thus less worthy of compassion or just treatment than the jurors themselves. Moreover, the prosecutor claimed that he knew, without a doubt, that Boyle was guilty. Finally, the special prosecutor implored the jurors to identify

themselves with the victim and his family in deciding Boyle's guilt and innocence.

Not surprisingly, the jury convicted Boyle and he was sent to prison. On direct appeal, Boyle raised the issue of prosecutorial misconduct. However, the Kentucky Court of Appeals found that Boyle waived the issue because his counsel failed to object to properly preserve the issue for review. The court then opined that even if the issue was reviewable, there was a strong likelihood that Boyle would have been convicted.

The Kentucky Supreme Court declined to exercise its discretionary jurisdiction and Boyle was unsuccessful in his post-conviction review. Boyle then filed a ' 2254 petition and the district court conditionally granted Boyle relief based on its conclusion that Boyle was deprived a fair trial because the prosecutorial errors infected the integrity of the proceeding.

The warden appealed and argued that procedural default in the state court precluded federal jurisdiction over Boyle's complaint about the special prosecutor's closing argument. The 6th Circuit held that a federal habeas corpus petitioner who fails to comply with the state's rules of procedure waives his right to federal habeas corpus review. However, the court recognized that the Supreme Court has cautioned, that "the mere existence of a basis for a state procedural bar does not deprive federal courts of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." Moreover, the last state court rendering a reasoned judgment on the matter must "clearly and expressly" state that its judgment rests on such a procedural bar.

This case then presented the issue of whether the Kentucky Court of Appeals "clearly and expressly" relied on procedural default to reject Boyle's claims. The 6th Circuit interpreted the state court of appeals' decision as one that did not rely substantially on procedural default as the opinion also adjudicated the issue assuming that Boyle had not waived the argument.

The court then used the following analysis in reviewing a claim of prosecutorial misconduct. The court must first determine whether the challenged statements were improper. If the statements were improper, the court will then determine if they were flagrant and warrant reversal. Flagrancy is determined by the analyzing the following 4 factors: (1) whether the

This case revolved around the meaning of "newly discovered evidence" as found in the first-prong of this test. The key to deciding whether evidence is newly discovered or only newly available is to ascertain when the defendant found out about the information at issue. A witness's shifting desire to testify truthfully does not make that witness's testimony newly discovered

statements tended to mislead the jury or prejudice the defendant; (2) whether the statements were isolated or among a series of improper statements; (3) whether the statements were deliberately or accidentally before the jury; and (4) the total strength of the evidence against the accused.

The 6th Circuit found that the cross-examination of Boyle and the special prosecutor's summation were highly improper. Moreover, the court applied the 4-prong test and concluded that the errors were flagrant under the circumstances. The court found that even though the case against Boyle was straightforward and strong, "given the egregious and inflammatory nature of the behavior and arguments of this prosecutor throughout the trial, we are left with a grave doubt as to whether the prosecutorial errors had substantial and injurious effect or influence in determining the jury's verdict. Therefore, the 6th Circuit affirmed the district court's grant of the writ of habeas corpus.

United States v. Turns, C F.3d C, 2000 WL 3856 (6th Cir. 2000).

Turns was convicted of knowingly possessing and transferring a machine gun in violation of 18 U.S.C. ' ' 922(o)(1) and 924(a)(2). Three weeks after being convicted by the jury, Turns filed a motion for a new trial alleging that his sister, Starlet Turns, possessed newly discovered evidence. In 2 affidavits prepared by Starlet, within days of the jury's verdict, Starlet claimed that her former boyfriend was the owner of the firearm and that her brother was unaware that the firearm was fully automatic when he pawned it at her request.

Starlet testified at an evidentiary hearing that she was unwilling to testify truthfully at her brother's trial because she did not want to implicate her former boyfriend. The district court granted Turns's motion for a new trial after finding that he was aware of Starlet's information at the time of his trial but he did not discover her willingness to testify truthfully until after the jury's verdict.

In order to prevail on a motion for a new trial based on newly discovered evidence, a defendant must show that the evidence: (1) was discovered after the trial; (2) could not have been discovered earlier with due diligence; (3) is material and not merely cumulative or impeaching; and (4) would likely produce an acquittal if the case was retried.

evidence. Whether or not a witness will testify truthfully if called to the witness stand is simply not "evidence" that can be used as a basis for filing a motion for a new trial.

Turns was aware of the information possessed by his sister prior to the trial. Because Turns and his counsel believed that Starlet would not testify truthfully, a strategic decision was made to not call her as a witness.

Thus, the 6th Circuit reversed the district court after finding that Starlet's testimony was, at best, newly available but not newly discovered evidence.

Murr v. United States, C F.3d C, 2000 WL 6152 (6th Cir. 2000).

In 1989, Murr was indicted and convicted in the Eastern District of Tennessee for narcotic offenses. As part of the plea agreement, the government agreed to not charge Murr for other offenses that he committed and about which it had knowledge in the Eastern District of Tennessee and the Northern District of Georgia. While the presentence report for this offense was being prepared, the government uncovered facts that Murr was the leader of a cocaine trafficking conspiracy in the Eastern District of Kentucky.

While serving a sentence on the Tennessee case, Murr was indicted for narcotics related offenses in the Eastern District of Kentucky. A jury convicted Murr of these offenses and he was sentenced to serve a concurrent sentence with his Tennessee sentence. Murr's conviction and sentence were affirmed on direct appeal.

Murr then filed a ' 2255 motion in the Eastern District of Kentucky in which he alleged that the Kentucky prosecution violated his rights under the 5th Amendment double jeopardy and due process clauses. The district court dismissed Murr's ' 2255 motion and he appealed.

On appeal, Murr argued that his constitutional rights were violated because the government knew of the facts underlying his conviction in Kentucky before he was convicted in Tennessee. However, Murr failed to raise this double jeopardy claim on direct review. The 6th Circuit found that the failure to raise an argument on direct appeal constitutes waiver of the issue on collateral review, absent a showing of both cause and actual prejudice. As Murr neither showed cause to excuse his procedural default nor actual prejudice from the alleged error, he was barred from raising this double jeopardy claim.

Nonetheless, the 6th Circuit considered the double jeopardy claim and concluded that it lacked merit as the protection applies to successive punishments and successive prosecutions for the same criminal offenses.

In order to determine whether a defendant was subjected to successful prosecutions for the same offense, the court applied the *same elements* test. This test asks whether

Murr argued that *Richardson* applied to his case retroactively and thus his CCE conviction must be vacated because the district court failed to instruct the jury as required by *Richardson*. A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review that are not yet final. Moreover, new

each offense contains an element not contained in the other. A defendant will be considered being placed in double jeopardy only if every violation of one statute entails a violation of another. The court found that the 2 prosecutions were distinct as they focused on different transactions; involved different people; and occurred in different places.

Murr also challenged the district court's refusal to grant his motion for severance. The 6th Circuit stated that *persons jointly indicted should be tried together*. The district court should only grant severance to properly joined defendants *if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence*. The defendant bears the burden of producing *a strong showing of factually specific and compelling prejudice that would mislead or confuse the jury*. If the defendant is able to show some potential jury confusion, this confusion must be balanced against society's interest in a speedy and efficient trial.

In this case, Murr alleged that the absence of a co-defendant, who was tried *in absentia*, constituted extreme prejudice to him in that the jury assumed that the co-defendant's absence indicated Murr's guilt. However, the 6th Circuit rejected this argument and found that the district court did not err in denying Murr's motion for severance.

One of the offenses for which Murr was convicted in Kentucky was engaging in a continuing criminal enterprise (CCE). In order to convict a defendant of a CCE offense, the government must prove: (i) a felony violation of a federal narcotics law; (ii) as a part of a *continuing series* of at least 3 violations; (iii) in concert with 5 or more persons; (iv) for whom the defendant is an organizer, supervisor or manager; and (v) from which he derives substantial income or resources.

In *Richardson v. United States*, 119 S. Ct. 1707 (1999), the Court held that a jury must unanimously agree on which specific violations constitute the *continuing series* of 3 or more predicate violations required to prove that a defendant engaged in a CCE. Furthermore, the Court held that the district court erred by failing to instruct the jurors that the *violations* are themselves elements of the CCE and, therefore, the jury was required to agree unanimously about which 3 (or more) related drug crimes the defendant committed.

constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced. Two exceptions to this rule are: (1) a new rule should apply retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; (2) the new rule should be applied retroactively

if it requires the observance of those procedures that are implicit in the concept of ordered liberty.

Generally, if the case announces a new procedural rule, it will not be applied retroactively whereas if the case announces a new substantive rule, it will be applied retroactively. The 6th Circuit concluded that *Richardson* announced a new rule of substantive law and thus applies retroactively. However, the court affirmed Murr's CCE conviction by applying the harmless error doctrine.

The court found that the district court's failure to expressly instruct the jury that they must unanimously agree which offenses constitute the CCE did not have a substantial and injurious influence or effect on the jury's guilty verdict on the CCE count. The court based this determination on the fact that the jury convicted Murr of all of the charged substantive offenses. The court concluded that this demonstrated the jurors' unanimity that Murr was guilty of these offenses. Moreover, these offenses were all related to one another and were not isolated events that happened in sequence and involved the same people.

United States v. Owusu, 2000 WL 3847 (6th Cir. 2000).

This appeal concerns sentencing issues raised by Benjamin Owusu and Tony Latham as well as trial and sentencing issues raised by Larry Latham. Tony raised 3 issues involving the district court's application of the Guidelines. First, Tony alleges that the district court erred in denying a mitigating role adjustment under USSG § 3B1.2. In order to qualify for this role reduction, the defendant must be less culpable than other participants and substantially less culpable than the average participant. The 6th Circuit affirmed the district court and found that although Tony was less culpable than Larry and Owusu, he was not less culpable than the other participants or substantially less culpable than the average participant in the conspiracy.

Tony also challenged the district court's determination on the drug quantity used to determine his relevant conduct. The 6th Circuit found that a sentencing court may hold a defendant accountable for a specific amount of drugs only if the defendant is more likely than not responsible for a quantity greater than or equal to that amount. If the exact amount of drugs involved is uncertain, the court may make an estimate supported by competent evidence in the record. The evidence must have a minimal level of reliability beyond mere allegation, and the court should err on the side of caution.

Constructive possession is established if the defendant has ownership, dominion, or control over the weapon. If the offense was a conspiracy, the government was not obligated to prove that the defendant actually possessed the weapon. Instead, the government can

in making its estimate.

Testimonial evidence from a coconspirator may be sufficient to determine the amount of drugs for which another coconspirator should be held accountable.

Using these principles, the 6th Circuit engaged in a factual analysis of this case and upheld the district court's drug quantity determination. Finally, Tony alleged that the district court erred in concluding that the drugs attributed to him were crack as the government failed to prove that the drugs were a processed form of sodium bicarbonate. The 6th Circuit found that the government has the burden of proving that the drugs under consideration were the crack form of cocaine base. Because Tony did not make this argument in the district court, the 6th Circuit reviewed the record for plain error.

The 6th Circuit found that the use of sodium bicarbonate is not a necessary prerequisite for the determination that a drug is crack. The Guideline definition of crack does not attempt to define crack as being manufactured in any particular way. In this case, the government adduced testimony that the substances were a chunky hard substance and this supported the conclusion that the drugs were a crack form of cocaine base.

On appeal, Larry claimed that the district court erred by improperly denying his motion for a judgment of acquittal on 4 counts of the indictment. To withstand review on appeal, the court must determine whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In evaluating this claim, the court found that it was not permitted to make credibility determinations. Instead, the court used an intensive factual determination and found that the district court erred in denying Larry's motion for judgment of acquittal on 2 counts but affirmed the denial on the 2 others.

Larry also claimed that the district court erred by concluding that the possession of a firearm enhancement was applicable under USSG § 2D1.1 (b)(1). In order to establish that this enhancement was appropriate, the government must prove, by a preponderance of the evidence, that: (1) the defendant actually or constructively possessed the firearm; and (2) such possession was during the commission of the offense.

discharge their burden by establishing that a member of the conspiracy possessed the weapon and that the member's possession was reasonably foreseeable by other members in the conspiracy.

In this case, Owusu and Larry were in a car

bringing 2 kilograms of cocaine from New Jersey to Ohio for resale. The car was stopped in New Jersey and the cocaine and firearms were discovered in the car. The firearms were registered to Owusu's sister and they were placed in the car by Owusu. The 6th Circuit found that even if the weapons were in Owusu's sole possession, this possession occurred in connection with the conspiracy between Larry and Owusu to distribute drugs. Where a defendant knew that his co-conspirator was trafficking in drugs with a gun in a car, possession was reasonably foreseeable and imputed to all defendants.

Owusu suffers from HIV and, on appeal, he sought review of the district court's denial of his motion for a downward departure for extraordinary physical impairment under USSC § 5H1.4. The 6th Circuit concluded that the district court understood that it had the authority to grant Owusu's motion for a downward departure based on his physical impairment. However, the district court declined to exercise its discretion. Thus, the 6th Circuit found that a court's refusal to exercise its discretion and grant a downward departure is not reviewable on appeal.

United States v. Tocco, 2000 WL 3849 (6th Cir. 2000).

Tocco was charged in an indictment relating to organized crime activities in Detroit, Michigan. Tocco was convicted of two RICO conspiracies and a Hobbs Act conspiracy. At sentencing, the district court departed 10 levels and imposed a sentence of a year and a day which was to be served in a community confinement center. Tocco appealed his conviction while the government appealed the sentence imposed.

On appeal, Tocco claimed that he was denied the right to a fair trial because the district court declined to permit specific questions during *voir dire* on the subject of Mafia prejudice. The 6th Circuit found that, generally, wide discretion is granted to the trial court in conducting *voir dire* in the area of pretrial publicity and in other areas of inquiry that might reveal juror bias. Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.

The 6th Circuit concluded that the district court would have been well-advised to allow more detailed

Tocco also challenged the district court's admission of Angelo Polizzi's plea agreement. The government sought the admission of the plea agreement to blunt any cross-examination impeaching of Polizzi's credibility with respect to cooperating with the prosecution. Tocco maintained that the language in the plea agreement that Polizzi would provide truthful and

questioning to reveal an individual prospective juror's prejudice, if any, against Cosa Nostra and the obvious Italian heritage of the defendants and the Sicilian or Italian connection with the Mafia. However, because of the 12 jurors who were selected, 7 knew nothing about the case and 5 had minimal knowledge, the court found that any error was harmless. The 5 jurors who had some knowledge of the case assured the district court that they could render a fair and impartial verdict despite any knowledge that they may possess. The 6th Circuit found that the district court sought to ensure the fairness of the jury selection process through more general, progressive questioning. Thus, under the circumstances, Tocco was not constitutionally entitled to any more specific race-based questions during *voir dire*.

An important part of the government's case was the testimony of Angelo Polizzi who testified about statements made to him by his father Michael Polizzi who died shortly before the trial. In these statements, Michael told his son about Tocco's role in the mob and he also identified the organizational hierarchy of the Detroit faction of the mob. The district court admitted the statements as declarations against penal interest (Fed. R. Evid. 804(b)(3)). To determine if Polizzi's statements qualify as a declaration against penal interest, the court will consider whether: (1) the declarant is unavailable; (2) from the perspective of the average, reasonable person, the statements were truly adverse to the declarant's penal interest, and (3) corroborating circumstances truly establish the trustworthiness of the statement.

Tocco argued that Michael's statements implicating others were inadmissible because they were about others and were not adverse to his penal interest. In order to be a declaration against penal interest, a statement must be sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. This issue can only be answered in light of the surrounding circumstances. The 6th Circuit rejected Tocco's argument and found that the statements described Michael's participation in the RICO enterprise as well as the participation of others. Thus, the 6th Circuit found that the district court did not err in admitting the statements

complete information showed that the government impermissibly vouched for his credibility. However, the 6th Circuit found that the government could introduce the entire plea agreement to permit the jury to consider fully the possible conflicting motivations underlying the witness's testimony.

The government also called an FBI agent as

both a fact and expert witness at the trial. On appeal, Tocco claimed that the district court erred in admitting this testimony because of the undue prejudice that results when a person testifies as both a fact and expert witness. The 6th Circuit recognized that there is a significant risk that the jury might be confused by the agent's dual role. However, there is no *per se* prohibition against calling an agent to testify in 2 capacities as long as the jury is properly instructed as to his or her dual role.

Tocco next argued that the district court erroneously admitted co-conspirator statements because the tape recordings did not contain statements that were made in furtherance of the charged conspiracy. The 6th Circuit found that almost all of the conversations were in some way made to further the conspiracy. However, the court was concerned that some of the conversations contained racial epithets that should have been excised as they were unfairly prejudicial. Nonetheless, the court concluded that the admission of these recordings was harmless error as they made up a very minor portion of the total discussions contained on the tapes.

Tocco then challenged the sufficiency of the evidence of his RICO convictions. Proof of the RICO allegation requires proof that the Association or enterprise existed and that the named defendants were associated with and agreed to participate in the conduct of its affairs, which affect interstate commerce, through a pattern of racketeering activity or through the collection of an unlawful debt. An enterprise is proven by evidence of an ongoing organization, formal or informal, and by evidence that the various associations function as a continuing unit. The court reviewed the entire record and concluded that the government easily proved the existence of an enterprise.

Tocco also challenged the sufficiency of the government's proof as to the existence of a pattern of racketeering activity. To show a pattern of racketeering activity conspiracy, a defendant need not personally agree to commit 2 predicate acts; rather, he need only know about and agree to facilitate the scheme. . . Further, a defendant need not know about every member and component of the enterprise; he need only know the

The downward departure based on Tocco's community service was linked to his participation in at least 12 charitable and civic organizations. The 6th Circuit found that charitable works are a discouraged factor but, under certain circumstances, are a permissible ground to support a downward departure. In assessing Tocco's charitable contributions, the court found that most of his contributions consisted of monetary contributions and not time and energy. The court concluded that Tocco's socio-economic status that might enable him to donate money to charities was a prohibited factor. Thus, the 6th Circuit, on remand, instructed the

general nature of the enterprise and that the enterprise extends beyond his role.

Tocco claimed that even though the alleged defendants knew one another, the evidence showed no more than a series of unrelated acts by people not acting in concert. However, there is no requirement of some overt or specific act in the RICO statute because 18 U.S.C. ' 1962 is even more comprehensive than the general conspiracy offense found in 18 U.S.C. ' 371. As long as the purpose of the agreement is to facilitate commission of a crime, the actor need not agree to commit the crime in order to violate the RICO statute. Thus, the 6th Circuit rejected Tocco's argument and found that there was sufficient evidence from which a jury could conclude that a pattern of racketeering activity existed.

The court then proceeded to address the propriety of the determination of Tocco's base offense level as well as the 10 level downward departure. The district court found that the case was outside the heartland and departed 4 levels for Tocco's overwhelming community service; 4 levels for Tocco's age and debilitating health; and 2 levels because of Tocco's wife's health.

The government argued that the district court erred in determining Tocco's base offense level. The 6th Circuit found that the district court made insufficient factual findings on certain issues and this issue could not be properly resolved on appeal. Therefore, the case was remanded for further hearing consistent with the court's opinion. However, the 6th Circuit ordered the district court to apply the 3 level enhancement for Tocco's supervisory role in the offense.

The court then proceeded to review the downward departure. The 6th Circuit found that in order to justify a downward departure, the case must be sufficiently unusual and outside the heartland of cases to warrant such a departure. If the court finds that the grounds relied upon by the district court justified a downward departure, the reviewing court must still determine whether the level of departure was reasonable in light of the reasons for the departure.

The district court to determine whether Tocco's community involvement was substantially a financial contribution or a commitment of time and energy. The former conclusion would prevent the court from using it as a downward departure whereas the latter would possibly support a downward departure.

As to Tocco's age and debilitating health, the district court determined that Tocco's age, 72, and debilitating health formed a basis for downward departure. The 6th Circuit also requested the district court, on remand, to obtain competent medical evidence to determine the extent of Tocco's infirmity and the affect

that incarceration might have on his current health situation.

The district court finally questioned the downward departure based on Tocco's wife's infirmities.

The court found that extraordinary and special family circumstances may justify a downward departure in exceptional cases. However, usually, this factor is taken into account when a defendant personally is requested to take care of a seriously ill family member. On remand, the 6th Circuit directed the district court to make findings on the extent of Tocco's personal involvement in the care of his wife or other family members.

United States v. Vandenberg, C F.3d C, 2000 WL 21041 (6th Cir. 2000).

Vandenberg pled guilty to conspiracy to transport stolen property in interstate commerce and the transportation of stolen property in violation of 18 U.S.C. ' ' 371 and 2314 respectively. The probation officer recommended a 2 level enhancement to Vandenberg's offense level because he was an organizer, leader, manager, or supervisor of criminal activity pursuant to USSG ' 3B1.1(c).

Vandenberg's counsel objected to this enhancement and the government agreed with counsel's objection. However, the district court resolved this issue by merely stating 'Based on the preponderance of the evidence that the 2 level enhancement is appropriate.'

Furthermore, the amount of restitution was not able to be determined at the time of sentencing. Thus, the district court ordered Vandenberg to pay an amount of restitution that could be determined at that time. Vandenberg's restitution obligation was increased more than \$160,000 82 days after sentencing. Moreover, approximately 4 months after the modification, the district court conducted a restitution hearing at which the amount of restitution was decreased by \$65,000.

One of the issues on appeal was the propriety of the district court's failure to articulate a factual basis for its conclusion that a role enhancement was appropriate.

The 6th Circuit found that it was certainly 'preferable' for a district court to articulate the precise reasons for applying a ' 3B1.1 enhancement. However, unlike an obstruction of justice enhancement under ' 3C1.1, the Guidelines do not require the district court to state its factual basis for a ' 3B1.1 enhancement.

The 6th Circuit then proceeded to review the

In 1986, Dusenbery was convicted of possession with intent to distribute cocaine and while incarcerated, he continued to run his cocaine operation.

This resulted in another conviction for violating the CCE statute. Incident to the CCE conviction, the government obtained administrative civil forfeiture of various items of Dusenbery's personal property. Subsequent to the finalization of the forfeiture process, Dusenbery filed a

propriety of the role enhancement and concluded that 'In general, a defendant must have exerted control over at least one individual within a criminal organization for the enhancement of ' 3B1.1 to be warranted.' 'In determining whether a defendant qualifies as a leader, organizer, manager or supervisor, a trial court should consider a number of factors, including but not limited to the defendant's exercise of decision-making authority, any recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning the offense, and the degree of control the defendant exercised over others.' 'The court concluded that Vandenberg neither claimed a right to a larger share of the fruits of the crime, nor took a leadership role in planning the details of the offense. Rather, it appears that Vandenberg's co-defendant initiated the criminal activity and exercised his own decision-making authority and retained possession over many of the stolen items. The fact the Vandenberg provided crucial information to a co-conspirator and played an important role in the offense does not support the conclusion that a role enhancement was justified.

The court then proceeded to address the restitution issue. When a restitution figure is not affixed at the time of sentencing, 18 U.S.C. ' 3664(d)(5) obligates the district court to defer the entry of the restitution order for 90 days to give the victims the opportunity to inform the probation office of the amount of restitution. The court is statutorily obligated to resolve the issue within 90 days of the sentencing hearing. The 6th Circuit concluded that ' 3664(d)(5) is not a jurisdictional statute and does not require a district court to conduct a restitution hearing within the 90 day period. However, ' 3664(d)(5) requires the sentencing court to resolve the restitution question within 90 days of the sentencing hearing.

The 6th Circuit found that the district court erred by failing to both resolve the restitution amount and provide Vandenberg an opportunity to object to the amount within 90 days of the sentencing hearing. However, even though the district court did not provide Vandenberg an opportunity to be heard within 90 days, the court provided him an opportunity to object thereafter. Therefore, the 6th Circuit found any error was harmless.

United States v. Dusenbery, C F.3d C, 2000 WL 19121 (6th Cir. 2000).

motion pursuant to Fed. R. Crim. P. 41(e), for the return of his property. In this motion, Dusenbery claimed that the government violated his right to due process by failing to provide him adequate notice of its intent to forfeit his property. The government claimed that it sent notice of the forfeiture to Dusenbery's mother and the federal prison where he was incarcerated. Moreover, the government published notice of the forfeiture in the

Cleveland Plain Dealer and claimed that Dusenbery was placed on notice of its intended forfeiture through evidence presented at his CCE trial.

The district court denied Dusenbery's 41(e) motion after concluding that Dusenbery received adequate notice of each forfeiture. The 6th Circuit reversed and remanded for further hearing to determine if Dusenbery received adequate notice. On remand, the district court determined that Dusenbery never received adequate notice of the pending forfeitures and that the notices published were insufficient as a matter of law. On remand, Dusenbery also argued that further forfeiture proceedings were barred by the 5 year statute of limitations found at 19 U.S.C. § 1621. The district court rejected this argument and found that the government established probable cause that the property constituted proceeds from illegal drug sales and granted the government summary judgment.

The 6th Circuit summarized the administrative forfeiture process as follows: If the property is valued at \$500,000 or less, the DEA may use an administrative forfeiture process in the customs laws. Publication of notice begins the administrative forfeiture. The DEA is also required to send notice to every party with an interest in the property. A claimant who has received constitutionally adequate notice of intent to forfeit then has 20 days from the date of the first publication of the notice of seizure to judicially contest the forfeiture by filing a claim with the DEA and a cost bond, or a declaration of inability to file a cost bond. If no claim is filed, an administrative forfeiture occurs by default.®

AA properly filed claim stops the administrative forfeiture process and requires the seizing agency to refer the matter to the United States Attorney to institute judicial forfeiture proceedings. The DEA is then required to show probable cause for the forfeiture. Upon a showing of probable cause, the burden shifts to the claimant to demonstrate that the property is his and not the proceeds of drug transactions.®

On appeal, the 6th Circuit assumed that the notices of forfeiture were insufficient. Thus, the question presented was what is the proper remedy for the due process violation in an administrative forfeiture proceeding when the statute of limitations for filing a judicial forfeiture action has expired?

As to the method of departing upward, the 6th Circuit found that the district court was well aware that the increase in Barber's offense level resulted in the same sentencing range that would have been present had the court simply increased his criminal history category from IV to VI. Furthermore, the 6th Circuit held that the Guidelines do not limit a court to departing in the criminal history category alone and do not prohibit a court from using an increase in the offense level to

The 6th Circuit found that inadequate forfeiture notices should be treated as voidable. Thus, the proper remedy is to simply restore the right which a timely Rule 41(e) notice would have conferred on the claimant: the right to judicially contest the forfeiture and to put the government to its proofs under a probable cause standard.® The government is not required to institute new forfeiture proceedings, and the applicable statute of limitations, § 1621, has no relevance to adjudicating the issue presented.

United States v. Barber, C F.3d C, 2000 WL 14434 (6th Cir. 2000).

Barber pled guilty to being a convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court departed upward 3 offense levels as Barber's criminal history failed to reflect the seriousness of his past criminal conduct.

On appeal, Barber challenged the district court's decision to depart as well as the method of departure implemented. In this case the district court used the vertical offense level axis, as opposed to the horizontal criminal history axis, of the guideline table in departing upward from the otherwise applicable criminal history category.

The 6th Circuit found that under USSG § 4A1.3, the Guidelines encourage departures based upon a finding that the criminal history computation is simply not representative of a defendant's past criminal behavior or indicative of future unlawful conduct. In this case, Barber had 9 juvenile convictions which were not counted by the Guidelines. Furthermore, at the time that Barber committed the offense, he was on lifetime parole to the State of Alabama and recently had numerous skirmishes with the law. However, despite these character flaws, Barber's criminal history category was only IV.

The 6th Circuit found that sometimes juvenile offenses may not be counted in computing a criminal history category. However, even though not counted, these offenses may still be considered as part of a recidivism inquiry. Thus, the court found that the district court did not abuse its discretion in departing upward.

accomplish the same result. As proof for this proposition, the court cited to USSG § 4A1.3 which encourages the court to consider imposing a sentence departing from the otherwise applicable guideline range.® Therefore, the Court found no errors in the departure method.

Johnson v. Coyle, C F.3d C, 2000 WL 16555 (6th Cir. 2000).

Johnson was convicted of 2 counts of

aggravated murder with death penalty specifications in Ohio. The jury recommended the death sentence and the appeals court affirmed Johnson's conviction and sentence. The Ohio Supreme Court reversed Johnson's conviction and remanded the case for a new trial. The Ohio Supreme Court found that Johnson's prior conviction for second degree murder in Florida was not a specific intent crime. Therefore, this conviction could not be an aggravating circumstance upon which a capital specification could be grounded. Moreover, the Supreme Court found that the trial court erred in admitting evidence that was unfairly prejudicial.

On rehearing, Johnson argued to the Ohio Supreme Court that in light of their ruling, there was insufficient evidence to support his conviction and that retrial would violate his double jeopardy rights. The Ohio Supreme Court denied rehearing and Johnson sought habeas relief. The district court denied Johnson's petition and he appealed to the 6th Circuit.

The 6th Circuit affirmed the dismissal of Johnson's ' 2254 petition. After reviewing the evidence produced at Johnson's trial, the court found that there was sufficient evidence from which a rational jury could find, beyond a reasonable doubt, that he committed the charged homicide, kidnapping, and rape.

United States v. Bahhur, C F.3d C, 2000 WL 21036 (6th Cir. 2000).

Between 1993 and 1995, Bahhur and 7 co-defendants engaged in a fraudulent food stamp redemption scheme at 2 convenient stores that he operated. At these stores, federal food stamp coupons were purchased at a discount for cash and redeemed for full value to the Federal Food Stamp Program by depositing the coupons in various bank accounts held in the names of the grocery stores operated by Bahhur.

Bahhur pled guilty to: a prohibited monetary transaction in violation of 18 U.S.C. ' 1957; food stamp

Bahhur next raised the sentencing issues that were rejected by the district court. Bahhur argued that the district court erred by using the money laundering guideline (' 2S1.2) as opposed to the fraud guideline (' 2F1.1) to determine his offense level. The 6th Circuit found that because ' 1B1.2(a) requires a defendant's offense level to be determined by applying the Guideline section most applicable to the offense of conviction, the district court properly applied ' 2S1.2. The next

issues surrounded the amount of loss and the aggravated role enhancement. The court held that when considering the value of the loss attributable to a defendant as well as his aggravated role, the government bears the burden of proving these sentencing enhancements, by a preponderance of the evidence. The 6th Circuit found that the district court properly determined that the amount of loss was between \$350,000 and \$600,000. Moreover,

fraud in violation of 7 U.S.C. ' 2024(b)(1); and failure to appear in violation of 18 U.S.C. ' 3146(a)(1).

The probation office determined that Bahhur's total offense level was 28. However, Bahhur objected to this computation as it included a: 3 level enhancement pursuant to USSG ' 2S1.2(b)(2) based upon the value of the criminally derived funds being more than \$350,000 but less than \$600,000; and 3 level enhancement to the offense level for the prohibited monetary transaction, pursuant to USSG ' 2J1.7, because he was convicted for violating both ' 1957 and ' 3146(a)(1). Finally, Bahhur argued that the district court erred by using the money laundering guideline (' 2S1.2) as opposed to the fraud guideline (' 2F1.1) to determine his base offense level. The district court denied these objections.

On appeal, Bahhur argued that the district court lacked subject matter jurisdiction over his ' 1957 conviction. Bahhur argued that for purposes of violating ' 1957, the specified unlawful activity must be a single felony food stamp transaction that involves a quantity of coupons that have a value of not less than \$5,000 as set forth in 18 U.S. C. ' 1956(c)(7)(D). Bahhur argued that because he never engaged in a transaction involving a quantity of coupons in excess of \$5,000, the district court was without subject matter jurisdiction to hear his case.

The 6th Circuit rejected this argument as ' 1957 is a federal statute that is clearly an offense against the laws of the United States. Therefore, 18 U.S.C. ' 3231 provides jurisdiction as district courts shall have original jurisdiction . . . of all offenses against the laws of the United States.® The 6th Circuit concluded that Bahhur's argument was not an appropriate attack on subject matter jurisdiction but was more likely an attack on the sufficiency of the evidence to support his ' 1957 conviction. However, as Bahhur did not enter a conditional guilty plea pursuant to Fed. R. Crim. P. 11(a)(2), he waived this issue for appellate review. the court found that the district court did not error in concluding that Bahhur played an aggravated role in the offense.

Finally, Bahhur argued that the district court erred by increasing his offense level for his prohibited monetary transaction 3 levels for his failure to appear. Instead, Bahhur maintained that the district court should have enhanced only his failure to appear guideline, but not his money laundering guideline.

In this case, after Bahhur was convicted of the 3 offenses, the district court grouped the 3 convictions into a single group. The district court then applied a 3 level enhancement to the group based on Bahhur's failure to appear.

USSG ' 2J1.7 provides that if an enhancement under ' 3147 applies, add three levels to the offense level for the offense committed while on release as if this

section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.®

The court held that because ' 3147 Ais an enhancement provision, rather than an offense, this section provides a specific offense characteristic to increase the offense committed while on release.® Using this plain language, the 6th Circuit found that the district court erred by applying the 3 level enhancement to Bahhur's underlying prohibitive monetary transaction conviction. Instead, the 3 level enhancement for failure to appear should have only been applied to his failure to appear conviction as this was the only offense committed while he was on release. The court found that separate guideline computations should have been performed on all 3 convictions. After this was done, the failure to appear, prohibited monetary transaction, and food stamp fraud cases should have then been grouped to arrive at a total offense level. Thus, the case was remanded for resentencing.

United States v. Hall, C F.3d C, 2000 WL 35808 (6th Cir. 2000).

Howard Graham was stopped in Kansas while driving a motor home filled with 135 pounds of marijuana. Graham cooperated and contacted a co-conspirator who instructed Graham to switch vehicles at a rest area. At the rest area, Graham switched vehicles with Rex and Stanley Hall. The Halls were followed to their home by law enforcement agents at which time they were arrested and marijuana and cocaine were found. The Halls' saga was completed when they were both represented by the same attorney, David VanHorn, and tried in federal court.

The district court informed the Halls that dual-representation could result in a conflict of interests. However, the Halls elected to continue with the same counsel. The government also advised the district court of several areas of potential conflicts including: the unsuccessful attempts to negotiate plea agreements; the failure of Van Horn to request discovery; potential conflict of defenses; and the disparity in sentences sought for the 2 defendants. However, Van Horn was permitted to continue representing both Halls.

The court found that dual-representation does not automatically constitute a 6th Amendment violation. A defendant may waive any potential conflicts of interest and elect to continue with dual-representation. This waiver, however, does not bind the courts. AThe purpose of the 6th Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure the defendant will inexorably be represented by the lawyer whom he prefers.®

Furthermore, the court found that conflict of interest cases involve a slightly different standard than

On the day before the trial, a hearing was conducted and both Halls requested the court to permit VanHorn to continue as their counsel. At trial, Rex Hall asserted the public authority defense claiming that he was operating as a government informant. Stanley testified that he believed that Rex was an informant and that he was assisting in the undercover operation.

The day before the close of the trial, Rex requested a continuance to obtain the presence of 3 witnesses. The district court granted a 1 day continuance to permit Rex the opportunity to secure the witnesses. However, Rex failed to mention the witnesses at the trial or request additional time to secure their attendance. Both Halls were convicted and imprisoned.

On appeal, Rex claimed that the district court violated his 6th Amendment rights by improperly denying a continuance to secure the presence of his witnesses. However, the district court granted a 1 day continuance but Rex failed to request further time to secure the presence of the witnesses. Because Rex failed to raise this issue at the district court, the 6th Circuit found that he waived his right to object.

However, the court found that even if Rex had objected, he failed to show that the district court abused its discretion in denying his motion for a continuance. The court found that Aa constitutional violation occurs only if the denial was an unreasonable and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay . . . Defendant must show that the denial resulted in actual prejudice in his defense.® The court found that Rex failed to show prejudice and affirmed his conviction.

Stanley Hall argued on appeal that his 6th Amendment rights were violated because VanHorn's dual-representation resulted in a conflict of interest. This issue was not presented at the district court and the 6th Circuit found that, as a general rule, an appellate court will not review claims of ineffective assistance of counsel for the first time on direct appeal. An exception to this rule is when the record is adequately developed to allow the court to assess the merits of the issue. The 6th Circuit found that the record at the district court was adequately developed and considered Stanley's argument.

that used in traditional ineffective assistance of counsel claims. AWhere there is a conflict of interest, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duty. . . . Thus, when an actual conflict of interest exists, prejudice is presumed. Prejudice is presumed, however, only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.®

The 6th Circuit found that a conflict of interest was evident in Stanley's case by VanHorn's failure to

successfully negotiate a plea agreement. In this case, both Halls entered a plea agreement with the government but both backed out at the last minute. Rex's plea agreement would have led to the imposition of a life sentence whereas Stanley's would have led to a Guideline sentencing range of between 3 and 4 years. After the trial, Rex received a life sentence while Stanley received a 10 year sentence. The court found that VanHorn failed to fully represent each defendant's interests, resulting in an actual conflict. The court concluded that while it was in Rex Hall's best interest to go to trial, it clearly was in Stanley Hall's best interest to plead. Stanley Hall had no previous record and the plea agreement was a good one.

Furthermore, the court found that VanHorn's performance was adversely affected by the conflict as reflected by VanHorn's trial strategy to concentrate only on Rex Hall's public authority defense. Because counsel was unable to vigorously represent both Stanley and Rex Hall, Stanley Hall has shown that an actual conflict of interest existed at trial such that the trial judge should have intervened and at that stage severed the case against Stanley Hall. Accordingly, the court reversed Stanley Hall's conviction.

United States v. Choice, C F.3d C, 2000 WL 38452 (6th Cir. 2000).

Choice was a federally licensed firearms dealer and pled guilty to knowingly and willfully selling a firearm without making a record of the sale in violation of 18 U.S.C. ' 922(b)(5). In the plea agreement, the parties stipulated that Choice knowingly and intentionally sold 1 firearm without making a written record and that he knew that he was required by law to make such a record. A condition of the plea agreement was that the district court would determine whether the offense charged was a misdemeanor or a felony.

The penalties for most violations of ' 922 are contained in ' 924. In particular, ' 924(a)(3)(A) provides that any licensed dealer who knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter is guilty of a misdemeanor. In contrast, ' 924(a)(1)(D), provides that whoever willfully violates any provision of the chapter, other than those

An Ohio jury convicted White of aggravated murder and felonious assault in 1989. White's conviction was affirmed by an Ohio appellate court in 1991. Shortly thereafter, White obtained new counsel in 1991 but an application to reopen White's case alleging that his appellate counsel was ineffective was not filed until 1994.

This application was denied by an Ohio appellate court because Ohio App. R. 26(B) provides: Aa

specifically named in ' 924, is guilty of a felony. The district court concluded that Choice pled guilty to a felony because he admitted that he willfully violated the record keeping laws and thus ' 924(a)(1)(D) applied.

The 6th Circuit found that the plain language of the statute indicates that ' 924(a)(1)(D) governs Choice's offense and that the district court was correct in concluding that he pled guilty to a felony. The court found that by its terms, ' 924(a)(3)(A) clearly applies only to licensed dealers who make false statements in connection with firearms sales, and not to those who fail to keep any records at all. . . [F]urthermore, ' 924(a)(3)(A) refers only to knowing offenses and therefore implicitly excludes Choice's willful violation from its scope. . . [T]hus, because ' 922(b)(5) contains no penalty provision of its own, Choice's willful violation of failing to keep records is punished by the catch-all felony provision of ' 924(a)(1)(D).

United States v. Green, C F.3d C, 2000 WL 45678 (6th Cir. 2000).

This case arose from an inmate disturbance which erupted at FCI Memphis because of the sentencing disparity that exists between defendants convicted of offenses involving crack as compared to those convicted of offenses involving powder cocaine. The 3 defendants in this appeal were charged with willfully attempting to cause and assisting a riot in a federal prison in violation of 18 U.S.C. ' 1792 as well as other offenses.

On appeal, Defendants Negron and Green argued that they were mere participants in the prison riot and this did not constitute a violation of ' 1792. Title 18 U.S.C. ' 1792 provides: Whoever instigates, connives, willfully attempts to cause, assists, or conspires to cause any mutiny or riot, at any Federal penal, detention, or correctional facility, shall be imprisoned . . .

The Defendants argued that the word assists means to instigate, cause or conspire to cause a prison riot and does not prohibit mere participation therein. The 6th Circuit rejected this interpretation and found that one who willfully participates in a mutiny or riot plainly assists any mutiny or riot and thereby violates the statute. Therefore, the convictions were affirmed. *White v. Schotten*, C F.3d C, 2000 WL 61640 (6th Cir. 2000).

defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within 90 days from journalization of the appellate judgment unless the application shows good cause for filing at a later time.

White's new counsel attached an affidavit

stating that although he was assigned to represent White in 1991, he was unable to review the case until late 1993 because of both his and his office's heavy case load. This affidavit served as White's basis for claiming that he had good cause to excuse his tardiness for filing his application. The appellate court rejected the application and the Ohio Supreme Court affirmed. The United States Supreme Court denied *certiorari*.

White then filed a ' 2254 which the district court dismissed after the judge found that the claims were procedurally defaulted under Ohio App. R. 26(B) because White was unable to show cause and prejudice for his default.

The 6th Circuit utilizes the following 4-prong test when the state argues that a federal habeas claim has been procedurally defaulted in state court. The 6th Circuit will consider whether: (1) there is a procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to follow this rule; (2) the state courts actually enforced the state procedural rule; (3) the state procedural rule is an adequate and independent state ground to foreclose federal relief; and if so, (4) the petitioner has established cause for his failure to follow the rule and prejudice by the alleged constitutional error.

Applying this test to this case, the 6th Circuit found that Rule 26(B) was in place and White failed to follow it. The court also found that the appellate court actually enforced the state procedural rule. The 6th Circuit found that the third factor requires it to consider whether the state procedural rule is an adequate and independent state ground to foreclose federal relief. Such a rule is adequate if it is regularly and consistently applied by the state court . . . and is independent if it does not depend on a federal constitutional ruling.®

The court concluded that state courts have not achieved a consensus of what constitutes good cause to excuse non-compliance with Rule 26(B). Thus, the court did not use the third factor to resolve this case. Instead, the court focused on the fourth factor and concluded that White established cause for his failure to follow the state procedural rule.

The court found that although White claimed that his counsel on direct appeal deprived him of the

Lanier was apprehended in Mexico and when he was deported, he admitted that he intentionally failed to surrender to serve his sentence and that he was using an alias to elude capture. Once in the United States, Lanier pled guilty to failing to appear in violation of 18 U.S.C. ' 3146. The district court applied USSG ' 2J1.7 and increased Lanier's offense level 3 levels for committing an offense while released on appeal. The offense that Lanier committed while on bond was his failure to appear. The district court sentenced Lanier to serve 12 months and he appealed.

effective assistance of counsel, it was more likely that his new attorney on the 26(B) application simply failed to file the necessary pleading in compliance with the rule.

An attorney's failure or refusal to abide by established time deadlines in handling a client's appeal is conduct falling below the minimal standards of competency that federal case law has imposed upon counsel to satisfy constitutional safeguards.®

The court found that because the Application for delayed reconsideration is neither of a state habeas nor state post-conviction proceeding, it must be a continuation of activities related to the direct appeal itself.® Because a defendant is entitled to effective assistance of counsel on direct appeal, . . . such an individual must be accorded effective assistance of counsel throughout all phases of that stage of the criminal proceedings. The failure of the attorney to offer such constitutionally-mandated counsel, excuses the failure of the petitioner to abide by the timely requirements of the applicable procedural rule.® As White made a showing of cause for his procedural default, the case was remanded to the district court for a finding as to whether he was prejudiced.

United States v. Lanier, C F.3d C, 2000 WL 48852 (6th Cir. 2000).

Lanier was a state court judge convicted of violating 18 U.S.C. ' 242 because of sexual assaults he perpetrated on women in his chambers. Lanier was sentenced to serve 25 years in prison and his conviction was affirmed by a panel of the 6th Circuit. However, the 6th Circuit, *en banc*, vacated Lanier's conviction and ordered his release on bond. The Supreme Court reversed and remanded to the 6th Circuit for further consideration.

On remand, before the merits of the remand were considered, the 6th Circuit ordered Lanier to report to begin serving his sentence. Instead of reporting to serve his sentence, Lanier fled to Tijuana and proceeded to live under an alias. Because Lanier failed to appear, his appeal that was pending in the 6th Circuit was dismissed.

On appeal, Lanier argued that the district court violated the double counting rule when it imposed the 3 level enhancement for committing the offense for failure to appear while he was on bond. Lanier argued that the failure to appear offense is necessarily always committed while on release. Consequently, to apply the 3 level enhancement constitutes double counting. The 6th Circuit rejected Lanier's argument and found that ' 3147 clearly and ambiguously mandates that the courts impose an additional sentence on persons convicted of crimes while on release.®

Lanier then argued that the *en banc* court lacked jurisdiction to vacate the panel's earlier release order because senior judges impermissibly served on the *en banc* court in violation of 28 U.S.C. ' 46(c). Lanier argued that his conviction was a nullity because his release order was erroneously vacated. The 6th Circuit found that Lanier waived this argument based on his guilty plea to ' 3146. The court reaffirmed the principle that the defendant waives all subsequent non-jurisdictional appeals to his conviction by pleading guilty.@

However, assuming *arguendo* that the issue was not waived by Lanier's guilty plea, the court reached the merits of his claim. The 6th Circuit held that Judge Keith was appropriately included in the *en banc* decision because he was a member of the original panel that affirmed Lanier's conviction. Furthermore, the court found that Judge Jones's participation had already been the subject of appellate litigation and settled. Therefore, Lanier's conviction and sentence were affirmed.

Summary of Defense Victories

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